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VIOXX AND CONSUMER PRODUCT PAIN RELIEF: THE POLICY IMPLICATIONS OF LIMITING COURTS' REGULATORY INFLUENCE OVER MASS CONSUMER PRODUCT CLAIMS

*Alec Johnson**

I. SOMEONE MUST HAVE CHECKED THIS OUT, RIGHT?

First, your prescription pain reliever gives you a heart attack.¹ Next, your efforts to eat healthier land you a case of salmonella.² Then, your dog's gravy-covered kibble attacks her kidneys.³ Finally, as if to make sure that no one in the American household goes unscathed, your kid gets lead poisoning from playing with Barbie.⁴ It is likely of little comfort that you are in good company. Combined, the recent recalls of Vioxx, bagged spinach, pet food, and

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1. See Gardiner Harris, *F.D.A. Official Admits 'Lapses' on Vioxx*, N.Y. TIMES, Mar. 2, 2005, at A15 (stating that FDA officials estimate that as many as 55,000 patients who had been prescribed Vioxx as a pain reliever may have died as a result of heart attacks or strokes induced by the drug).

2. See *Spinach Recalled After Positive Test for Salmonella*, N.Y. TIMES, Aug. 30, 2007, at A19 (noting that prior contamination of spinach with E. coli had killed 3 people and sickened 200).

3. See Katie Zezima, *22 Brands of Dog Biscuits Are Added to Pet Food Recall*, N.Y. TIMES, Apr. 6, 2007, at A15 (reporting that the FDA has received more than 12,000 complaints associated with a recall of pet food containing contaminated wheat gluten).

4. See Eric Lipton, *More Lead-Tainted Items are Found at Retailers*, N.Y. TIMES, Sept. 19, 2007, at C2 (reporting that some Barbie related items were found to be coated with paint with lead concentrations significantly higher than the legal limit).

lead-painted toys sent U.S. consumers scrambling through toy boxes and cabinets to weed out heretofore unknown dangers.

In so doing, U.S. consumers have begun to question some basic assumptions about the safety of items filling American households.⁵ As the mother of one child sickened from contaminated spinach testified before Congress, "You live in the United States of America and this isn't supposed to happen. There is an assumption that everything is going to be O.K., that someone must have checked this out, but it is not the case."⁶ The political effects that come with a consumer-based economy suddenly mistrusting the products that define it cannot be underestimated. Over the past year, Congress has held multiple hearings investigating both the Food and Drug Administration ("FDA")⁷ and the Consumer Product Safety Commission ("C.P.S.C."),⁸ as calls have come to revamp regulatory policy in response to the wave of recalls.⁹

Yet Congress is not the sole point of impact for this pressure to protect consumers. When regulatory safeguards fail, courts are often the initial branch to confront the dangers that have reached large classes of consumers. From asbestos in their homes¹⁰ to dangerous defects in their cars,¹¹ U.S. consumers have primarily relied upon the courts, rather than regulatory agencies, to provide relief and future protection. Compared with other industrialized nations, regulatory safeguards in the U.S. have been traditionally limited due to

5. See Eric Lipton & Louise Story, *Toy Makers Seek Standards for U.S. Safety*, N.Y. TIMES, Sept. 7, 2007, at C1 ("These news stories have really shaken the confidence of American families in toys." (quoting Sen. Richard J. Durbin)).

6. Marian Burros, *Who's Watching What We Eat?*, N.Y. TIMES, May 16, 2007, at F1 (internal quotation marks omitted).

7. See Alexei Barrionuevo, *Food Imports Often Escape Scrutiny*, N.Y. TIMES, May 1, 2007, at C1 (reporting on hearing involving the FDA's handling of food safety issues); Gardiner Harris, *F.D.A. Remains Unsettled in Wake of New Questions*, N.Y. TIMES, May 31, 2007, at A14 (reporting on hearing involving the FDA's handling of drug safety issues).

8. See Eric Lipton, *Senators Urge More Stringent Rules for Toy Safety*, N.Y. TIMES, Sept. 13, 2007, at C1 (discussing Senate proposals to revamp the C.P.S.C.).

9. See, e.g., Stephen Labaton, *Bush to Offer Safety Plan on Imports*, N.Y. TIMES, Nov. 6, 2007, at C1.

10. See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (certifying mandatory class in Texas asbestos litigation), *vacated sub nom.* *Flanagan v. Ahern*, 521 U.S. 1114 (1997) (vacating the judgment and remanding the case to the Fifth Circuit for further consideration in light of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

11. See *White v. Gen. Motors Corp.*, 97-1028, p. 8-9 (La. App. 1 Cir. 6/29/98), 718 So. 2d 480 (certifying a class action settlement involving pickup truck owners injured as a result of defective fuel tanks).

longstanding concerns about over-regulation limiting economic growth.¹² The result is a tacit reliance upon U.S. courts to fill the void where consumer interests have not been adequately protected.¹³ As such, the safety of U.S. consumer products is balanced between low regulatory safeguards and the economic pressures of potential litigation. But what some consumers, like the mother mentioned earlier, are beginning to question is whether the current balance of regulation and litigation adequately protects consumer interests.

The circumstances surrounding the recall of Vioxx outline the general parameters of this question. Years before even warning labels were added to Vioxx, the drug's manufacturer, Merck & Co., was aware of a potential increased risk of heart attack and stroke associated with the drug.¹⁴ While the FDA subsequently became quite concerned about these risks, the agency lacks the authority to demand specific warning labels for drugs.¹⁵ Forced to negotiate with Merck over the language and size of warning labels for Vioxx, FDA officials struggled to find an acceptable compromise as the drug remained on the market with no warnings.¹⁶ Indeed, Vioxx had been Merck's cornerstone product since its introduction in 1999, accounting for \$2.5 billion in sales in 2003 and representing 11 percent of the company's revenue.¹⁷ Fearing the loss of millions of dollars in sales if the warnings were too prominent, Merck resisted FDA attempts to make the warnings more visible,¹⁸ despite the company's knowledge of the drug's potential dangers.¹⁹

12. See Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media?*, 26 HOUS. J. INT'L L. 385, 387 (2004) (discussing how the United States, unlike many other developed nations, offers few administrative remedies to harmed consumers and subsequently uses courts to fill the gap).

13. See *id.*

14. See John Curran, *Vioxx Troubled Merck Scientist*, RECORD (Bergen County, NJ), Sept. 22, 2005, at B3; Harris, *supra* note 1.

15. See Harris, *supra* note 1 (describing how the FDA must negotiate with pharmaceutical companies over the warning labels placed on medications).

16. See Curran, *supra* note 14 (noting internal Merck e-mails where the company's chief scientist called FDA officials "bastards" for suggesting a warning label that the Vioxx development team thought was "ugly").

17. See Gina Kolata, *A Widely Used Arthritis Drug Is Withdrawn*, N.Y. TIMES, Oct. 1, 2004, at A1.

18. See Curran, *supra* note 14; Harris, *supra* note 1.

19. See Alex Berenson et al., *Dangerous Data – Retracing a Medical Trial*, N.Y. TIMES, Nov. 14, 2004, at N1 (detailing Merck's knowledge of potential heart risks associated with Vioxx years before warnings were added or the drug was recalled).

After almost five years on the market, additional studies revealed a clear link between Vioxx and increased rates of heart attack and stroke.²⁰ Merck subsequently pulled the drug in late 2004.²¹ With more than twenty million Americans having taken Vioxx between 1999 and 2004, epidemiologists estimate that Vioxx may have caused over 100,000 heart attacks.²² Federal and state courts across the country were quickly flooded with over 25,000 suits against Merck,²³ including multiple class actions,²⁴ which all generally cited Merck's failure to properly warn patients of Vioxx's risks.²⁵

Despite initial plaintiff victories that plunged the company's stock price,²⁶ Merck maintained a strategy of litigating each case separately²⁷ and defeated attempts to certify nationwide class actions.²⁸ Through twenty trials over the past two years, Merck managed to reverse its fortunes by securing defense verdicts or hung juries in fifteen of the cases.²⁹ These results led to a tentative settlement that could resolve a vast majority of the pending cases and cap Merck's liability at \$4.85 billion.³⁰ While amounting to nine

20. See Kolata, *supra* note 17 ("[T]here was a discernible and unexpected increase in cardiovascular disease rates What we saw was stunning." (quoting Dr. Peter S. Kim, President of Merck Research Labs)).

21. See *id.*

22. See Alex Berenson, *Vioxx Jury Adds More in Damages*, N.Y. TIMES, Apr. 12, 2006, at C1.

23. See Sarah Kershaw, *New York and City Sue Merck over Vioxx*, N.Y. TIMES, Sept. 18, 2007, at B3.

24. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 192 N.J. 372 (2007).

25. See Bill Dawson & Alex Berenson, *The Vioxx Decision: The Jury Working Through a Decision Cut in Shades of Deep Gray*, N.Y. TIMES, Aug. 20, 2005, at C13 (reporting on Texas juror's view of the inadequacy of the warning labels originally applied to Vioxx).

26. See Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES, Aug. 20, 2005, at A1 [hereinafter Berenson, *Merck Liable*].

27. See Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1 [hereinafter Berenson, *Analysts*].

28. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (denying certification to a nationwide class of plaintiffs claiming personal injury as a result of taking Vioxx); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund*, 192 N.J. 372 (denying certification to a nationwide class of third-party payors who helped pay for Vioxx prescriptions as part of health insurance benefits).

29. See Andrew Longstreth, *\$4.85 Billion Vioxx Settlement Validates Merck's Courthouse Strategy*, AM. LAW., Nov. 12, 2007.

30. See Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007, at A1 [hereinafter Berenson, *Settlement*] (noting that the settlement only becomes effective if 85 percent of plaintiffs agree to accept the offer, and then it would provide plaintiffs

months of the company's profit, the settlement is still seen as a relative victory for Merck, since analysts earlier estimated that a potential settlement could have cost as much as \$25 billion and plunged the company into bankruptcy.³¹

Yet, the course of the Vioxx litigation and the current proposed settlement show how recent trends in complex litigation have substantially impacted consumer interests. In denying class certification of a nationwide class of injured plaintiffs and scheduling only a limited number of initial trials,³² U.S. District Court Judge Eldon E. Fallon of the Eastern District of Louisiana allowed Merck to pursue its strategy of litigating claims separately. Merck was thus able to attack the facts specific to individual plaintiffs regarding causation.³³ Yet after the initial wave of trials, Judge Fallon evidently pressured the parties to reach a settlement,³⁴ possibly by threatening to substantially increase the pace of the pending trials.³⁵ "He had everything to do with it," said one attorney involved in the negotiations.³⁶ With the leverage that comes with managing thousands of coordinated cases, the decisions of courts in handling such complex litigation matters have far-reaching effects that ultimately act as de facto regulation upon the industry in question and affect the interests of future consumers.³⁷

While Merck's anticipated level of liability has been continually evaluated and reflected in its stock price,³⁸ the market effects of the

with varying amounts of compensation based on the severity of their injuries and their respective length of time taking Vioxx).

31. See Berenson, *Analysts*, *supra* note 27.

32. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450.

33. See Alex Berenson, *Legal Stance May Pay Off for Merck*, N.Y. TIMES, Aug. 4, 2006, at C1 [hereinafter Berenson, *Legal Stance*] (noting that the plaintiffs in the Vioxx cases were generally older with additional risk factors for heart attack, which complicated causation issues).

34. See Berenson, *Settlement*, *supra* note 30.

35. See Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES, Nov. 17, 2007, at C1 ("If Merck had continued to fight, the judges could have piled on so many trials that the company would have been begging for mercy.").

36. Berenson, *Settlement*, *supra* note 30.

37. See Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1215-18 (2001) (discussing the use of state courts to regulate specific industry issues); see also Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 192-98 (2003) (arguing that regulation through litigation undermines democratic principles).

38. See, e.g., *Judge Denies Class Status for Lawsuits over Vioxx*, N.Y. TIMES, Nov. 23, 2006, at C2 (reporting that shares of Merck rose 16 cents following the district court's decision to deny nationwide class certification to plaintiffs claiming injury from Vioxx); Berenson, *Legal*

Vioxx cases will eventually reach beyond the financial markets. Just as Merck's financially motivated decision to fight the FDA on warning labels inevitably impacted consumers,³⁹ so too will the outcome of the Vioxx litigation affect the risk calculus applied by other drug manufacturers in evaluating future products. Indeed, the success of Merck's aggressive litigation strategy may establish a new standard and new expectations for the defense of mass consumer product claims.⁴⁰ As a result, consumer warning standards for the industry as a whole will be influenced as much by the market effects of the Vioxx cases as they are by the FDA.

But is this tort-based regulatory influence an appropriate role for courts? Does the settlement of a class of individual claims actually reflect a solution to the problem underlying those claims? As the size of aggregated claims has increased with the development of class actions and other complex litigation procedures,⁴¹ courts have struggled with the burden of serving more as regulator than adjudicator.⁴² In dealing with large classes of claims, courts have at times even suggested legislative intervention over judicial administration.⁴³ Particularly within the realm of class certification under Federal Rule of Civil Procedure 23 ("Rule 23"), these issues have greatly influenced the changing landscape of complex litigation in recent years.

Created in the progressive era of *Brown v. Board of Education*,⁴⁴ the modern class action was intended to allow plaintiffs to seek relief

Stance, *supra* note 33 (noting a 27 percent increase in Merck's stock price following several favorable jury decisions regarding Vioxx claims).

39. See Harris, *supra* note 1; Berenson et al., *supra* note 19.

40. See Berenson, *Analysts*, *supra* note 27 ("More broadly, the case shows that after years of aggressively lobbying against trial lawyers, corporate America has regained substantial leverage against plaintiffs and their lawyers — whose lawsuits bankrupted Dow Corning and the asbestos industry in the 1990s. In many states, changes governing lawsuits have made claims tougher to bring and win, while much public opinion has turned against plaintiffs.").

41. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356 (1995) (noting the increase in mass tort actions during the 1980s).

42. See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 410–16 (2007) (discussing the administrative difficulties faced by the district court in administering the settlement of claims related to diet drug litigation).

43. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597–98 (1997) (discussing a report by the Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist stating that the wave of national asbestos litigation "required federal legislation creating a national asbestos dispute-resolution scheme").

44. 347 U.S. 483 (1954).

through aggregation for harms that could not be realistically redressed through individual litigation.⁴⁵ As described by Chief Justice William Burger in *Deposit Guaranty National Bank v. Roper*,⁴⁶ the class action mechanism is “an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”⁴⁷ Yet the power of class actions to “deputiz[e] all attorneys everywhere to enforce our laws”⁴⁸ has always brought with it concerns over procedural fairness. Indeed, just after his comment on the development of class actions, Chief Justice Burger noted that the “potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.”⁴⁹

In trying to balance these concerns, Congress, the courts, and practitioners have engaged in an ongoing struggle over the scope and application of class actions.⁵⁰ As noted over twenty-five years ago in *Deposit Guaranty*, “[T]he remedy for abuses does not lie in denying the relief sought . . . , but with re-examination of Rule 23 as to untoward consequences.”⁵¹ The results of this ongoing examination have continually altered the litigation of mass consumer product actions both for high-value claims (such as the heart attack victims

45. See *Amchem*, 521 U.S. at 617 (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” (quoting *Mace v. Van Ru Credit Group*, 109 F.3d 338, 344 (1997))); see also Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L L. 179, 179–80 (2001) (discussing differing opinions over the intent of the 1966 changes to Rule 23).

46. 445 U.S. 326 (1980).

47. *Id.* at 339.

48. Statement of William T. Coleman, Jr. (Nov. 22, 1996), in 4 COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES, PROPOSED AMENDMENTS TO RULE 23, at 449, 456 (1997).

49. *Deposit Guar.*, 445 U.S. at 339. It should be noted, however, that this last issue extends to all mass claims, not just those certified under a class action. The proposed Vioxx settlement, for instance, would generally award individual plaintiffs less than \$80,000 each after attorneys’ fees and require them to first go through a number of evaluations, while a limited number of plaintiffs firms will earn nearly \$2 billion in fees. See Berenson, *Settlement*, *supra* note 30.

50. See Georgene M. Vairo, *Foreword: Developments in the Law: The Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 979 (2006).

51. 445 U.S. at 339.

involved in the Vioxx cases) and negative-value claims⁵² (such as the plaintiffs in *Deposit Guaranty* seeking recovery for nominal credit card service charges).⁵³ But recent developments in complex litigation have largely weakened the ability of courts to protect consumer interests, just as those interests are coming under attack from a wave of dangerous products.

This Article will address the policy implications of recent trends in the ongoing re-examination of Rule 23 that have substantially impacted the regulatory influence of courts handling mass consumer product claims. Part II will first discuss the regulatory issues inherent to consumer product class actions, as well as the federalism tensions that accompany them. Part III will then analyze the Supreme Court's unwillingness to expand the federal courts' regulatory role in handling such claims and subsequent decisions limiting the certification of nationwide class actions. Further, this section will examine how the Court's reluctance to clearly delineate the boundaries of state versus federal control over nationwide class actions exacerbated the federalism tensions already inherent to class actions, fueling controversial forum shopping. Part IV will then discuss how Congress's action to resolve this controversy through the Class Action Fairness Act of 2005 ("CAFA")⁵⁴ seriously limited the viability of consumer product class actions. In so doing, Congress correctly identified many problems with judicial management of consumer product claims but largely ignored the larger purpose behind such actions.

Finally, Part V will return to the current state of mass consumer product litigation by examining the proposed Vioxx settlement. Additionally, this section will briefly discuss the current, limited ability of regulatory agencies to adequately manage consumer safety issues. When seen in the context of the balance of consumer

52. Negative-value claims are generally defined as controversies in which the transactional costs involved with pursuing the claim outweigh the potential recovery of an individual plaintiff. See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1861 (2006).

53. 445 U.S. at 327-29.

54. Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). As will be discussed in Part D, CAFA granted federal courts jurisdiction over class actions where only minimal diversity between the parties was established and also placed significant restrictions upon the use of "coupon settlements" frequently used in actions involving negative-value claims.

protection provided by regulatory action and consumer litigation, decisions by the Supreme Court and Congress have significantly limited the ability of courts to act as a regulatory backstop on consumer product issues. While these decisions were largely a reasonable reaction to the inherent problems of using courts as a regulatory branch, ultimate consumer interests have not been well served. Accordingly, this Article will argue that Congress will have to expand the regulatory authority and capability of agencies such as the FDA and C.P.S.C. in order to adequately balance the level of protection demanded by U.S. consumers.

II. THE REGULATORY ISSUES INHERENT TO CONSUMER CLASS ACTIONS

During the period of the mid-1980s through the early 1990s, federal courts were faced with a series of mass consumer product controversies—involving asbestos,⁵⁵ Agent Orange,⁵⁶ the Dalkon Shield,⁵⁷ and breast implants,⁵⁸ among others—that overloaded court dockets and created an urgent need for a more efficient method to manage such mass claims.⁵⁹ In the face of the efficiency problems created by the sheer number of these individual cases,⁶⁰ federal courts began to expand the scope of the class action mechanism in this period, largely because of the increases in group settlements that accompanied class certification.⁶¹ However, many of these cases highlighted the regulatory tensions inherent to the use of class actions in consumer product controversies. In particular, *In re*

55. See *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996) (certifying mandatory class in Texas asbestos litigation), *vacated sub nom.* *Flanagan v. Ahern*, 521 U.S. 1114, 1114–15 (1997) (vacating the judgment and remanding the case to the Fifth Circuit for further consideration in light of *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

56. See *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987).

57. See *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989).

58. See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1469 (N.D. Ala. 1995).

59. See generally Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559, 1570–73 (2000) [hereinafter Vairo, *Judicial v. Congressional*] (noting efficiency considerations motivating class action in mass torts).

60. See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 749–50 (E.D.N.Y. 1984) (“Some 600 separate cases have been sent to this district from all over the country with an estimated fifteen thousand named plaintiffs.”)

61. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1573–74.

*Rhone-Poulenc Rorer, Inc.*⁶² (involving a class of hemophiliacs infected with the AIDS virus through blood transfusions) laid out many of the issues that would drive the analysis of class certification standards over the next ten years, ultimately affecting the management of controversies like the Vioxx litigation today.

While the AIDS virus was first identified in 1981, it was not until 1984 that transmission of the virus through blood was confirmed.⁶³ Further, it was another year before the major drug companies that manufactured blood solids had adequate procedures in place to ensure that the products regularly relied upon by hemophiliacs were not infected with the virus.⁶⁴ During this period in the early 1980s, it is estimated that more than 10,000 hemophiliacs in the United States contracted the AIDS virus through infected blood solids, resulting in roughly 2000 deaths by 1995.⁶⁵ Yet with the statute of limitations having almost expired in many states by that time,⁶⁶ these drug companies faced just 300 or so individual suits from affected hemophiliacs, involving fewer than 500 plaintiffs.⁶⁷

In fact, plaintiffs faced an uphill battle in these suits because so little had been known about the AIDS virus during the time when most hemophiliacs were infected.⁶⁸ As such, plaintiffs were largely relying upon an unusual “serendipity” theory based on potential prevention measures the drug companies could have used to prevent other known dangers at the time.⁶⁹ While resisting certification of a class of affected hemophiliacs, the defendant drug companies had in fact won twelve of the first thirteen individual suits brought.⁷⁰

From the initial facts of *Rhone-Poulenc*, the challenge confronting courts in balancing the diverse range of policy issues inherent to Rule 23 starts to become clear.⁷¹ The plaintiffs

62. 51 F.3d 1293 (7th Cir. 1995).

63. *See id.* at 1294–96.

64. *Id.*

65. *Id.* at 1296.

66. *Id.* at 1298.

67. *Id.* at 1296.

68. *Id.*

69. *Id.* Plaintiffs argued that if the drug companies had used more effective measures to screen donors for Hepatitis B, contamination by the AIDS virus would have been significantly minimized.

70. *Id.*

71. *Id.*

potentially affected by class certification in this case presented a wide range of interests: from the families of deceased patients, to those patient-claimants already ill, to those who were infected with HIV but not yet ill, and finally the potential future claimants who might not have known of their infection. Further, the defendant drug companies, those parties who had invested in the industry, and even the court system itself each had their own particular interests in the management of the case as well.

In essence, class certification judgments require a balancing of all of these interests, as well as policy determinations about their relative weights. In doing so, courts are forced out of the limited, traditional role of adjudicating specific claims and forced to act as regulatory bodies evaluating potential costs and benefits to a broad range of diverse interests.⁷² This broad judicial role creates federalism tensions between state and federal courts, as well as between individual states.

A. The Policy Issues Behind Rule 23's Requirements

Initially, Rule 23(a) establishes four threshold elements required for all federal class actions:⁷³

(1) numerosity (a “class [so large] that joinder of all members is impracticable”);

(2) commonality (“questions of law or fact common to the class”);

(3) typicality (named parties’ claims or defenses “are typical . . . of the class”); and

72. See generally Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 (2003) (examining efforts to limit the ability of courts to craft non-traditional remedies to modern controversies); see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (describing the development of “managerial judging” as an ad hoc effort by courts to manage the scope of modern litigation).

73. As will be discussed later in this Part, the technical requirements of Rule 23—if not the interpretation of them—are largely mirrored in most state court rules. See James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 445 (2004). For a discussion of class certification requirements in individual states, including California, New York, Illinois, Texas, and Florida, see William R. Shafton, *Developments, California's Uncommon Common Law Class Action Litigation*, 41 LOY. L.A. L. REV. 783 (2008) and Adam Feit, *Developments, Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899 (2008).

(4) adequacy of representation (representatives “will fairly and adequately protect the interests of the class”).⁷⁴

Rule 23(b) establishes additional requirements for specific types of class actions, and it is under 23(b)(3)—designed for damages class actions meant to be binding on all class members who do not affirmatively opt-out⁷⁵—where two additional requirements for maintaining most consumer products class actions are found:

(5) “Common questions must ‘predominate over any questions affecting only individual members;’”⁷⁶ and

(6) “[C]lass resolution must be ‘superior to other available methods for the fair and efficient adjudication of the controversy.’”⁷⁷

In establishing these six broad requirements for class certification, the 1966 Advisory Committee that modernized Rule 23 was attempting to craft a class action mechanism that would effectively balance multiple policy issues including judicial economy, individual rights, uniformity of decisions, and procedural fairness.⁷⁸ Further, federal courts are also required to weigh these same requirements before approving the settlement of a 23(b)(3) class action, regardless of whether the class has been certified.⁷⁹ Feeding into this balance of policy considerations are conflicts over the factual cohesiveness of a class, the law applying to the class, and the rights of individual class members. The initial requirements under 23(a) tend to merge with each other in assessing these

74. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (quoting FED. R. CIV. P. 23(a)).

75. Rules 23(b)(1) and 23(b)(2) relate to circumstances in which class members affirmatively elect to be included in the class. See FED. R. CIV. P. 23(b)(1), 23(b)(2).

76. *Amchem*, 521 U.S. at 615–16 (quoting FED. R. CIV. P. 23(b)(3)). FED. R. CIV. P. 23(b)(3) provides that:

[F]actors pertinent to a court’s “closer look” at the predominance and superiority criteria [include]: “(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

77. *Amchem*, 521 U.S. at 615–16 (quoting FED. R. CIV. P. 23(b)(3)).

78. *Id.* at 613–18.

79. See FED. R. CIV. P. 23(e) (requiring a court to make a finding that a proposed resolution to a class action is “fair, reasonable, and adequate” before approving a proposed “settlement, voluntary dismissal, or compromise” that would bind class members); see also *Amchem*, 521 U.S. at 619–22 (requiring a court to find that a settlement class could be certified under the 23(a) and 23(b)(3) factors, except for 23(b)(3)(D)).

conflicts.⁸⁰ But in heightening these same policy concerns, the predominance and superiority requirements of 23(b)(3) have led courts to evaluate additional conflicts regarding settlement pressures inherent in class actions and the overall procedural fairness of allowing class certification for certain claims.

1. Cohesiveness of Class Claims

The uniformity of the “questions of law or fact”⁸¹ that potentially connect a class is the initial focus of Rule 23(a)’s requirements.⁸² Accordingly, courts have primarily centered their analysis on the variation of underlying characteristics implicit to the class claims.⁸³ The first step of this commonality/typicality analysis generally focuses on the factual connections that might substantially differentiate class members’ claims. For instance, Judge Posner of the Seventh Circuit noted in *Rhone-Poulenc* that the “differences in the date of infection” among the potential class members was by itself enough of a fact variation to make standard class certification infeasible.⁸⁴ However, variations in the degrees of harm or exposure suffered by class members require courts to estimate an appropriate point of factual commonality that arguably could be established at multiple points.⁸⁵ In so doing, courts are essentially creating regulatory boundaries which establish how similar products or injuries must be with each other in order for the classification to be sustainable.⁸⁶

80. *Id.* at 626 n.20.

81. FED. R. CIV. P. 23(a).

82. *See Amchem*, 521 U.S. at 626 n.20 (stating that the criteria of 23(a) attempts to determine whether the class members’ claims are sufficiently interrelated). Somewhat distanced from 23(a)’s last three requirements is the numerosity requirement’s indistinct burden “that joinder of all members is impracticable.” *See* FED. R. CIV. P. 23(a)(1). This first requirement is rarely given significant analysis by courts, as speculative assertions of “substantial” class members has been held to be sufficient. *See, e.g., Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 997 (9th Cir. 2007); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006).

83. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 460 (E.D. La. 2006) (citing *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 205–06 (D. Minn. 2003)).

84. 51 F.3d 1293, 1296–97 (7th Cir. 1995).

85. *See Amchem*, 521 U.S. at 623–24 (criticizing the district court’s reliance on exposure to asbestos as a sufficient point of commonality when there were significant variations in the degrees of exposure, source of exposure, and subsequent harm).

86. *See Daffin*, 458 F.3d at 552 (examining case history as to level of commonality required between products).

While these boundaries are generally given a “low threshold” under the commonality requirement,⁸⁷ courts have required a much higher burden on these same factors to meet the typicality requirement. Where an analysis of commonality tends to stop at issues of general causation, for instance, typicality requires that a class representative share the same “essential characteristics” as all of the proposed class members, including course of conduct and legal theories.⁸⁸ In consumer product cases, variations in consumers’ contact with the product inevitably force courts to consider whether these variations can allow for any claim to be “typical” of the entire class. Naturally, variations in usage that are common to almost any consumer product present the same questions regarding the scope of any class. This issue is illustrated by the fact that one district court that denied certification of a class of Vioxx users simply pasted “Vioxx” into the typicality portion of an opinion from another district court that had rejected class certification related to another medication:

[T]he underlying facts and circumstances of this case do not make the proposed personal injury class amenable to class certification. This case involves a vast number of persons who took different dosages of [Vioxx], at different times, and possibly took [Vioxx] concomitantly with other prescription drugs. Because the theories asserted by this putative class are based on what [Merck] knew at the time [Vioxx] was prescribed, and whether [Merck] acted reasonably based on such knowledge, the claims of the named representatives are not typical of the class.⁸⁹

Indeed, Judge Posner could have used almost the same wording to demonstrate variations within the potential class of hemophiliacs from *Rhone-Poulenc*. Within this analysis, however, lies the question of just what variations in usage are actually significant enough to appropriately divide a potential class. As such, it is important to recognize that courts are making essentially regulatory

87. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 459 (“There is a low threshold for commonality, and the fact that some plaintiffs have different claims or require individualized analysis does not defeat commonality.”).

88. *Id.* at 459–60.

89. *Id.* at 460 (quoting *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 205–206 (D. Minn. 2003) (alterations in original)).

decisions within this analysis that establish the potential scope of combined claims.

Further, the broader problem borne out by the final outcome of *Rhone-Poulenc* was that despite the variations among plaintiffs that barred class certification, the court subsequently accepted a global class settlement granting a set recovery amount per claimant.⁹⁰ Judge Posner went so far as to describe the agreement as “downright weird” in light of the differing degrees of injury among plaintiffs but accepted the settlement anyway.⁹¹ This willingness to accept class settlements that ostensibly conflicted with the certification requirements of Rule 23 was later rejected by the Supreme Court in *Amchem*.⁹² Also, subsequent amendments to Rule 23⁹³ as well as CAFA⁹⁴ require courts to apply a heightened analysis to proposed class settlements in order to protect the interests of absent class members.⁹⁵ Accordingly, the requirement that courts determine the fairness of settlement procedures that might not always accommodate these variations has placed a further layer of regulatory responsibility upon courts.⁹⁶

2. Choice-of-Law Issues

Concerns over the potential scope of a proposed class underlie the policy decisions inherent to almost all of Rule 23’s requirements. The most common sticking point in the analysis of consumer product class actions is the choice-of-law problem that comes with any nationwide class action based on state law. As noted by Judge

90. See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998).

91. *Id.* Some commentators have speculated that the Seventh Circuit was willing to accept the Rhone-Poulenc settlement because the court was comfortable with a private, mutual resolution that was not agreed to under the pressure of class certification. See Lahav, *supra* note 42, at 420–21.

92. See *Amchem*, 521 U.S. at 620.

93. See FED. R. CIV. P. 23(e).

94. See Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

95. See, e.g., *In re Diet Drugs*, No. 1203, 2000 U.S. Dist. LEXIS 12275, at *207 (E.D. Pa. Aug. 28, 2000) (where the court evaluated and approved a class settlement regarding the health effects of two prescription diet drugs).

96. In examining the proposed Vioxx settlement, Part E will also look at the ramifications of not having a court thoroughly examine the ultimate fairness of mass consumer product settlements that are not brought forth under class treatment but may ultimately diminish plaintiffs’ legal options.

Fallon in denying nationwide class certification in *Vioxx*, “[A] choice-of-law analysis presents significant hurdles to certification of a nationwide class . . . because the application of the laws of fifty-one jurisdictions to the claims of the proposed class creates problems for the typicality, adequacy, predominance, and superiority requirements of Rule 23.”⁹⁷ While federal courts holding diversity jurisdiction must apply the choice-of-law statutes adopted by the state in which they are sitting,⁹⁸ most state choice-of-law statutes require an evaluation of other states’ competing interests in enforcing their own laws, particularly over harms occurring within their borders.⁹⁹ While the analysis of such a question within an individual suit would necessarily involve a choice of a particular state’s law, such an analysis in the class certification context has increasingly led to an outright bar on nationwide class actions because no single state’s interest can be found to predominate.¹⁰⁰ Inherent within such a judgment, however, is a policy determination that the interests of the individual states should weigh more heavily than either the interests of the nationwide class in aggregating their claims or the interests of an individual state in adjudicating the possible bad acts of a corporate citizen.¹⁰¹

3. Protection of Class Members’ Rights

The third major policy issue woven within 23(a)’s requirements is the protection of class members’ rights, particularly those members who are uninvolved and may in fact be completely unaware

97. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 459 (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)).

98. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

99. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (analyzing Indiana’s choice-of-law provisions and its underlying *lex loci delicti* principle); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 455 (detailing New Jersey’s choice-of-law provisions).

100. *See* Jeremy T. Grabill, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 309–311 (2005).

101. *See In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. at 455–58; *see also In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 288 F.3d at 1015–19 (rejecting a district court’s evaluation that the efficiency of class treatment should hold greater weight than the difficulties inherent to acts occurring across multiple states).

of the litigation.¹⁰² While notification requirements and the ability to opt out of the class form a significant part of Rule 23,¹⁰³ concerns over the potential lost opportunity for uninvolved class members to adequately assert their claims following a judgment or settlement underlie much of courts' Rule 23(a) analysis.¹⁰⁴ Yet these considerations require courts to estimate not only the extent of the potential classes' claims but also the extent of future class members' damages.¹⁰⁵

As expressed in Congress's stated reasoning for CAFA, there is also significant concern over abuses in which class counsel negotiate "settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel."¹⁰⁶ Indeed, appellate courts have voiced concern over settlements alleged to have been reached through "reverse auction," the practice whereby the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.¹⁰⁷

Potential objectors to a class settlement or even future collateral attacks upon the settlement have largely been shown to be ineffective means to safeguard the interests of absent class members.¹⁰⁸ As such, class action settlements impose an exceptional duty on courts to act as a regulator, evaluating present, absent, and future interests at stake in any class settlement. As the Seventh Circuit has noted, "we and

102. See *Amchem*, 521 U.S. at 626 n.20 (stating that one of the goals of 23(a)'s requirements is to ensure "that the interests of the class members will be fairly and adequately protected in their absence").

103. FED. R. CIV. P. 23(c)(2)(B).

104. See *Amchem*, 521 U.S. at 616.

105. See *id.* at 626 (identifying one of the major problems with the proposed global asbestos settlement as the lack of sufficient protection for the future injuries of plaintiffs who had been exposed to asbestos but had not yet developed injury); see also *In re Diet Drugs*, No. 1203 2000 U.S. Dist. LEXIS 12275, *140–44 (E.D. Pa. Aug. 28, 2000) (where the court found that a diet drugs settlement overcame the problems of future plaintiffs that derailed the *Amchem* settlement by creating detailed compensation rights for class members who developed future injuries). These compensation rights for future injuries, however, have caused the settlement total to substantially increase over time. See *Addition to Wyeth Fen-Phen Fund Approved*, N.Y. TIMES, May 25, 2006, at C3.

106. S. REP. NO. 109–14, at 4 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 6.

107. *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002).

108. See Lonny Sheinkopf Hoffman, *Syngenta, Stephenson and the Federal Judicial Injunctive Power*, 37 AKRON L. REV. 605, 650 (2004).

other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”¹⁰⁹ Such a role is obviously far removed from courts’ traditional role as neutral arbiters.

4. Settlement Pressures

As federal courts have evaluated the additional class certification requirements of Rule 23(b)(3), problematic issues inherent to the very nature of consumer class actions have been raised. Indeed, in *Rhone-Poulenc*, Judge Posner put forth two arguments regarding inherent conflicts presented by the number of claims involved in the litigation, which ultimately seemed to influence the rationale behind CAFA ten years later. First, class certification would have added roughly 9000 additional plaintiffs (twenty-five times the roughly 400 original plaintiffs who had individually brought suit) without any indication that a significant percentage of the class was actually seeking redress from the drug companies.¹¹⁰ Second, 400 individual claims, while potentially quite costly, were unlikely to bankrupt the entire industry, whereas 10,000 claims aggregated in a class certainly had that potential.¹¹¹ Factoring in the limited success of plaintiffs’ prior individual suits,¹¹² the Seventh Circuit estimated that a grant of class certification on the issue would increase the industry’s potential liability from roughly \$125 million in defending 300 individual suits to at least \$25 billion in defending one certified class action.¹¹³ Stating that such a drastic potential liability would place defendants “under intense pressure to settle,” Judge Posner underscored how class certification itself can become more important to the resolution of a consumer product issue

109. *Reynolds*, 288 F.3d at 279–80.

110. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1296–300 (7th Cir. 1995).

111. *Id.*

112. *Id.* at 1299 (“A notable feature of this case, and one that has not been remarked upon or encountered, so far as we are aware, in previous cases, is the demonstrated great likelihood that the plaintiffs’ claims, despite their human appeal, lack legal merit. This is the inference from the defendants’ having won 92.3 percent (12/13) of the cases to have gone to judgment.”). This evaluation of the merit of plaintiffs’ claim within the analysis of class certification was very controversial. See JoEllen Lind, “Procedural Swift”: *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 761–62 (2004).

113. *In re Rhone-Poulenc*, 51 F.3d at 1298–99.

than the actual merit of the claims.¹¹⁴ This contention is supported by the fact that certified class actions generally settle shortly after certification.¹¹⁵ Indeed, the court used this “blackmail” effect¹¹⁶ of class certification to help justify the extraordinary step of granting a writ of mandamus to bar class certification.¹¹⁷ “The reason that an appeal will come too late to provide effective relief for these defendants is the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them.”¹¹⁸

5. Fair and Efficient Adjudication

The concern over this increase in overall magnitude through the aggregation of claims strikes right at the heart of the policy issues underlying Rule 23(b)(3), namely that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”¹¹⁹ As some commentators have noted, “[e]vidence indicates that the aggregation of claims increases both the likelihood that a defendant will be found liable and the size of any damages award that may result. Defendants are far more likely to be found liable in cases with large numbers of plaintiffs than in cases involving one or just a few plaintiffs.”¹²⁰

In evaluating the merits of class certification, some courts have even espoused the benefits of the “diversified decisionmaking” created through a decentralized litigation process over the judicial

114. *Id.* at 1298.

115. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 143 (1996) (“[C]ertified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. The percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%.”); see also Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501–04 (1987).

116. *In re Rhone-Poulenc*, 51 F.3d at 1298 (quoting the term “blackmail settlement” from HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973)).

117. *Id.* at 1294–95 (holding that a writ of mandamus is an extraordinary judicial act but nonetheless warranted in the particular case). It should be noted that Rule 23 subsection (f) was amended in 1998 to allow for interlocutory appeal of decisions regarding class certification. See FED. R. CIV. P. 23(f) advisory committee’s notes on 1998 amendments.

118. *In re Rhone-Poulenc*, 51 F.3d at 1297.

119. FED. R. CIV. P. 23(b)(3).

120. Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform* 37 HARV. J. ON LEGIS. 483, 491–92 (2000).

efficiency provided by claim aggregation.¹²¹ As detailed by the Seventh Circuit in *Rhone-Poulenc*:

One jury, consisting of six persons (the standard federal civil jury nowadays consists of six regular jurors and two alternates), will hold the fate of an industry in the palm of its hand. This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries—and hurl the industry into bankruptcy. That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle—whether or not it really is liable) without violating anyone’s legal rights. But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.¹²²

In furtherance of this view, some courts have relied upon a series of initial “bellwether” trials in order to help formulate a more balanced overall settlement.¹²³

As discussed in Part I, this approach was used in the Vioxx litigation, with a tentative settlement reached following twenty-one initial trials.¹²⁴ Yet the Vioxx settlement was likely based as much on judicial pressure as it was on the results of the initial trials.¹²⁵ Further, as will be discussed in Part V, there are elements of the agreement that radically affect the interests of all plaintiffs, even though the settlement is not class based.¹²⁶ Accordingly, courts are

121. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1019–20 (7th Cir. 2002).

122. *In re Rhone-Poulenc*, 51 F.3d at 1300.

123. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019–20 (5th Cir. 1997) (describing the process by which bellwether trials are used to help craft an ultimate settlement).

124. *See Berenson, Settlement*, *supra* note 30.

125. *See Nocera, supra* note 35.

126. *See Alex Berenson, Lawyers Seek to Alter Settlement over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4 (noting complaints over a provision of the settlement which requires plaintiff

faced with a range of policy concerns in even these ostensibly private, mutual settlements that parallel many of the concerns faced in evaluating a class-based settlement.

B. The Federalism Tensions Inherent Within Class Certification

The precarious balancing of policy issues that has been presented so far has focused only on federal courts' interpretation of Rule 23. Yet state courts and their individual class action rules were a key part of the turmoil that eventually led to CAFA.¹²⁷ The reason is that some state courts have evaluated the policy concerns detailed above much differently than federal courts and extended certification to classes, even nationwide classes with clear choice-of-law problems,¹²⁸ that would normally not be certified in federal courts.¹²⁹ For instance, some state courts have re-focused traditional choice-of-law analysis by attributing greater value to the interests of a home state in having its regulations applied to a citizen manufacturer.¹³⁰ In so doing, however, these courts have imposed an individual state's regulatory schemes upon the remaining forty-nine states and their citizens, creating horizontal federalism tensions between the states. With plaintiffs bringing parallel actions in both state and federal courts and pursuing collateral attacks on federal certification decisions, federal courts have also been left in the tenuous position of attempting to enforce their decisions through the All Writs Act¹³¹ while not upsetting the balance of federalism demanded by the Anti-

attorneys to recommend the settlement to all of their clients and to withdraw from representing any client who chooses to litigate further rather than accept the settlement) [hereinafter Berenson, *Alteration*]; see also Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12 (discussing the legal ethics of such a requirement).

127. S. REP. NO. 109-14, at 6-23 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 7-23.

128. See, e.g., *White v. Gen. Motors Corp.*, 97-1028, p. 5-6 (La. App. 1 Cir. 6/29/98), 718 So. 2d 480 (approving a nationwide consumer product settlement previously rejected by the Third Circuit in *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 777 (3rd Cir. 1995)); see also Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 465-70 (2000) (detailing the story of the competing class actions involving side-mounted fuel tanks on General Motors pickup trucks).

129. See *Vairo, Judicial v. Congressional*, supra note 59, at 1598-600 (identifying a more receptive approach to class certification within certain state courts).

130. See *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, ¶ 15, 81 P.3d 618, 625-26 ("[T]he relative interest of each buyer's home state in applying its version of the UCC is more or less equal. By contrast, Michigan's interest in having its regulatory scheme applied to the conduct of a Michigan manufacturer is most significant.").

131. 28 U.S.C. § 1651 (2000).

Injunction Act.¹³² As such, the secondary effects of class certification have created myriad federalism problems.

1. Extending the Borders of State Law

In discussing the drive to replace the Articles of Confederation with a reformulated constitution, Justice Brennan noted that “a central concern of the Framers . . . [was] the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”¹³³ While “federalism” has meant many things to different commentators,¹³⁴ part of the initial push towards a stronger federal government described by Justice Brennan must have included the desire to prevent states from unilaterally exporting their policy decisions across state lines. This view was certainly taken by Congress in drafting CAFA.¹³⁵ In decrying an Alabama court’s certification of a nationwide class action regarding defective airbags, the Senate Judiciary Committee’s report in support of the legislation asked, “Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?”¹³⁶ Labeling such state court decisions as “false federalism,” the drafters of CAFA argued that state court certification of nationwide class actions “flies in the face of basic federalism principles by embracing the view that other states should abide by a deciding court’s law whenever it decides that its own laws are preferable to other states’ contrary policy choices.”¹³⁷ Yet not only can the certification of nationwide classes by state courts have such an effect, they can also

132. *Id.* § 2283; see also Joshua J. Wes, *The Anti-Injunction and All Writs Act in Complex Litigation*, 37 LOY. L.A. L. REV. 1603 (2004) (discussing the case history of the Anti-Injunction and All Writs Acts as they have been employed in parallel class action cases).

133. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

134. See ROBERT W. HOFFERT, A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS, at xi (1992) (“A feast of ‘federalisms’ has been offered up to the American public. Dual federalism, national-supremacy federalism, marble cake federalism, new federalism, picket-fence federalism, and crazy quilt federalism are just some of the ‘flavors.’”); see also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 11–23 (2003) (discussing the Supreme Court’s current view of federalism as a limitation on the federal government’s intrusion into traditionally state areas of governance).

135. Class Action Fairness Act, 28 U.S.C. §§ 1711–15 (2005).

136. S. REP. NO. 109–14, at 24 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 24.

137. *Id.* at 26.

work to limit the recovery of an out-of-state class member who may have had no substantial contacts with the jurisdiction.¹³⁸ As such, class certification decisions by state courts can have significant interstate commerce effects that result in state judicial regulation of national industries and interests.¹³⁹

2. The Muddy Line Between State and Federal Control Over Class Certification

Some state courts have effectively undermined federal court decisions regarding class certification. In instances where federal courts (and even other state courts) have denied class certification for a nationwide class, plaintiffs have continued to shop their action until finding a state court willing to certify.¹⁴⁰ For example, a settlement class involving fuel tanks in General Motors pickups was eventually certified in Louisiana after first having been rejected by both the Third Circuit and Texas state courts.¹⁴¹ As Judge Easterbrook of the Seventh Circuit described the scenario:

Relitigation can turn even an unlikely outcome into reality. Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering these claims and products. What this might mean in practice is something like “9 of 10 judges in every state would rule against certifying a nationwide class” (in the federal courts, it has meant that 3 of 4 judges have ruled against the proposed nationwide classes). Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification

138. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–13 (1985) (holding that a state can exercise jurisdiction over absent class members, “even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant,” so long as the minimum constitutional requirements of notice and opportunity to be heard are met).

139. *See Nagareda*, *supra* note 37, at 192 (arguing that the use of class actions undermines politically accountable regulatory agencies); Schwartz & Lorber, *supra* note 37, at 1215–18 (discussing the use of litigation to regulate industries).

140. *See supra* note 128 and accompanying text.

141. *White v. Gen. Motors Corp.*, 97-1028, p. 8–9 (La. App. 1 Cir. 6/29/98), 718 So. 2d 480.

decisions fade into insignificance. A single positive trumps all the negatives.¹⁴²

As such, plaintiffs' ability to seek nationwide certification in multiple forums, often overlapping with each other, creates significant barriers to defendants' ability to ever completely defeat the threat of class certification, wasting judicial resources¹⁴³ and undercutting the authority of federal court decisions along the way.¹⁴⁴

In acting to protect the preclusive effect of their decisions, federal courts have been left with options that necessarily entail precarious issues of federalism. The All Writs Act allows for federal courts to issue orders "necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹⁴⁵ Yet this tool for bolstering the efficiency of federal courts was traditionally viewed quite narrowly, particularly in regards to interference with state courts.¹⁴⁶ Indeed, the Anti-Injunction Act directly limited the scope of the All Writs Act as it could be applied to enjoin state court actions: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."¹⁴⁷ More broadly, the right to maintain separate judicial systems was one of the sovereign powers retained by the states under the Constitution.¹⁴⁸ As such, tensions created by conflicting decisions over class certification have made it difficult to efficiently adjudicate nationwide class actions without upsetting the federalism balance between state and federal courts. In combination with the balance of

142. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–767 (7th Cir. 2003) (emphasis omitted).

143. See James M. Underwood, *Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 408–411 (2004) (describing the concerns associated with multiple overlapping class actions involving the same issue and prospective class).

144. See *infra* Part C (discussing in detail the Supreme Court's decision regarding the balance of power between state and federal courts).

145. 28 U.S.C. § 1651 (2000).

146. See *Wes*, *supra* note 132, at 1622–24. The Supreme Court has also refused to allow the use of the All Writs Act to support removal of state actions to federal court. See *infra* Part C; see also *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002).

147. 28 U.S.C. § 2283 (2000); see also *Atlantic Coast Line R.R. Co. v. Bd. of Locomotive Eng'rs*, 398 U.S. 281 (1970) (detailing the limits of federal court powers to enjoin state court action).

148. See *Atlantic Coast Line*, 398 U.S. at 285.

policy considerations discussed earlier, the federalism tensions inherent in class certification decisions compounded the burden facing the Supreme Court and ultimately Congress in resolving these issues.

III. THE BIPOLAR APPROACH OF FEDERAL COURTS TO CLASS CERTIFICATION

In examining the Supreme Court's approach to these various aspects of class action litigation prior to CAFA, it becomes clear that the Court eventually succeeded in effectively sorting out only part of this policy puzzle. The Court's 1985 decision in *Phillips Petroleum Co. v. Shutts*¹⁴⁹ in particular highlighted trends that would prove to be significant to this issue. In *Shutts*, a Kansas trial court certified a class of some 28,000 plaintiffs spread across all fifty states and several foreign countries who all owned interests in natural gas deposits leased by the defendant.¹⁵⁰ Incorporated in Delaware with its principal place of business in Oklahoma, the defendant gas company produced gas in eleven different states and sold most of it in interstate commerce, making royalty payments to plaintiffs according to the price charged.¹⁵¹ While awaiting approval from the Federal Power Commission for price increases already in place, however, defendant maintained royalty rates at their prior levels.¹⁵² Following subsequent agency approval of the rate increases, plaintiffs sought interest on the back royalty payments.¹⁵³ Finding for the plaintiff royalty owners, the trial court awarded the class rates of interest based on Kansas law, resulting in an average award of \$100 per royalty owner.¹⁵⁴

In overturning the Supreme Court of Kansas's decision to uphold the trial judgment, the Supreme Court made two holdings that each significantly affected the future course of class action litigation, but in ultimately contradictory ways. First, the Supreme Court upheld the state court's jurisdiction over the thousands of plaintiffs who owned no land in Kansas and lacked any contacts with the

149. 472 U.S. 797 (1985).

150. *Id.* at 799.

151. *Id.* at 799–801.

152. *Id.*

153. *Id.*

154. *Id.* at 801–802.

forum, finding that reasonable efforts to notify class members and allow them to opt out were sufficient to satisfy due process requirements for absent class members.¹⁵⁵ Next, however, the Supreme Court rejected the reasoning of the Supreme Court of Kansas that a finding of jurisdiction created a presumption that “the law of the forum should be applied unless compelling reasons exist for applying a different law.”¹⁵⁶ Arguing instead that such a presumption improperly overcame Rule 23’s commonality requirement through a “bootstrap argument,”¹⁵⁷ then Justice Rehnquist wrote for the court:

[A state] may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a “common question of law.” The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.¹⁵⁸

Accordingly, the Supreme Court found the choice of Kansas law as “arbitrary” due to the lack of contact between the state and the majority of class claims¹⁵⁹ but found no similar “arbitrariness” bar to state jurisdiction over the class, despite the same demonstrated lack of contact.¹⁶⁰ Implicit within this analysis is the Court’s reliance on the procedural safeguards of class certification, rather than

155. *Id.* at 811–12 (“[A] forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant.”).

156. *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1181 (Kan. 1984).

157. *Phillips*, 472 U.S. at 821 (internal quotation marks omitted).

158. *Id.*

159. *Id.* at 821–22. The court noted that 99 percent of the gas leases and 97 percent of the plaintiffs had no apparent connection to the state of Kansas. *Id.* at 815–16.

160. *Id.* at 806–812.

jurisdictional safeguards, to properly protect the interests of absent class members.¹⁶¹

This divergence in the importance of “forum contacts” as respectively applied to personal jurisdiction and choice-of-law signaled future trends within class action litigation that would ultimately come into conflict. As a result of the *Shutts* decision, Kansas could assert jurisdiction over a nationwide class of plaintiffs but was limited in its ability to adjudicate such a nationwide controversy if following the Court’s increasingly restrictive choice-of-law analysis.¹⁶²

Yet Justice Stevens’s dissent in the case,¹⁶³ as well as the subsequent litigation involving the parties,¹⁶⁴ reflects the latitude that state courts still retained in interpreting other states’ laws and the procedural requirements associated with class actions.¹⁶⁵ As will be discussed, the Court made no clear attempt to prevent state courts from asserting independent control over the adjudication of nationwide classes, even when such state adjudication conflicted with the analysis applied in federal courts. Accordingly, as the Supreme Court heightened the requirements necessary for class certification in subsequent cases, state courts were not required to

161. *Id.* at 809 (“A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs’ and the absent plaintiffs’ claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs’ interest.”).

162. *Id.* at 821–22 (holding that a state “must have a ‘significant contact or significant aggregation of contacts’ to the claims asserted by each member of the plaintiff class, contacts ‘creating state interests,’ in order to ensure that the choice of [the state’s] law is not arbitrary or unfair” (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981))).

163. *Id.* at 834–38 (Stevens, J. concurring in part and dissenting in part) (“This Court, of course, can have no concern with the substantive merits of common-law decisions reached by state courts faithfully applying their own law or the law of another State. When application of purely state law is at issue, ‘[t]he power delegated to us is for the restraint of unconstitutional [actions] by the States, and not for the correction of alleged errors committed by their judiciary.’” (quoting *Commercial Bank of Cincinnati v. Buckingham’s Ex’rs*, 46 U.S. (5 How.) 317, 343 (1847))).

164. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730–731 (1988) (“To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court’s attention.”).

165. *Id.* at 722 (“Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.”).

follow this trend. As such, the Supreme Court's reluctance to clearly define the judicial balance of federalism associated with the adjudication of nationwide class actions allowed state courts to undermine the federal approach towards class certification.

*A. The Move in Federal Courts Towards Restricting
Class Certification*

Over the twenty-year period between the 1966 modifications to Rule 23 and the Supreme Court's decision in *Shutts*, federal courts had generally been reluctant to allow the use of class actions as a way to manage consumer product actions involving large numbers of plaintiffs from across the country.¹⁶⁶ Indeed, the members of the 1966 Advisory Committee did not think that the modified Rule 23 would generally be appropriate for use with consumer product claims.¹⁶⁷ Accordingly, the Court's restrictive choice-of-law analysis in *Shutts* matched prior trends within the federal courts limiting the scope of class action litigation. As mentioned earlier, however, federal courts were faced with a series of mass consumer product controversies in the mid-1980s through the early 1990s that overwhelmed judicial resources.¹⁶⁸ In the face of efficiency problems created by the sheer numbers of these individual cases,¹⁶⁹ federal courts became more amenable to class certification for a time, largely because of the increases in group settlements that accompanied class certification.¹⁷⁰ As stated by the district court managing the Agent Orange litigation, "a classwide finding of causation may serve to resolve the claims of individual members, in a way that determinations in individual cases would not, by enhancing the possibility of settlement among the parties"¹⁷¹ This ultimately short-lived trend in federal courts towards granting class certification was driven by regulatory policy considerations favoring efficiency in managing these broad, national

166. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1568–70.

167. 2 COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 47, at 260.

168. See *supra* notes 55–58 and accompanying text.

169. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 749–50 (E.D.N.Y. 1984) ("Some 600 separate cases have been sent to this district from all over the country with an estimated fifteen thousand named plaintiffs.").

170. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1573–74.

171. *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983).

controversies.¹⁷² As summarized by the Fifth Circuit in evaluating the overwhelming number of asbestos cases flooding both state and federal courts:

Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant's attorney to the extent enjoyed by the profession in the past.¹⁷³

The Supreme Court's 1997 decision in *Amchem*, however, marked the Court's unease with this expanding regulatory role and definitively swung federal courts back towards the more critical analysis of class certification requirements exhibited in *Shutts*.¹⁷⁴ In rejecting a class action settlement of the "asbestos-litigation crisis" facing courts at that time,¹⁷⁵ Justice Ginsburg began the majority opinion by noting the conclusion of the Ad Hoc Committee on Asbestos Litigation¹⁷⁶ that a real solution to the controversy "required federal legislation creating a national asbestos dispute-resolution scheme."¹⁷⁷ Pointedly stating that "[t]o this date, no congressional response has emerged," Justice Ginsburg framed the expanding use of class certification by lower courts as efforts to create national

172. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1573–74.

173. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (citations omitted).

174. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 611–28 (1997) (upholding decertification of a settlement class of plaintiffs affected by asbestos exposure).

175. *Id.* at 597.

176. The Ad Hoc Committee on Asbestos Litigation was appointed by Chief Justice Rehnquist in September 1990 and prepared a report outlining the judicial problems associated with the wave of asbestos exposure litigation that began during the 1970s. See AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991).

177. *Amchem*, 521 U.S. at 598.

regulatory solutions not authorized by Congress.¹⁷⁸ The *Amchem* decision restricted these efforts by clearly rejecting the policy interest in promoting broad settlements at the expense of the requirements of Rule 23:

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.¹⁷⁹

In holding that the requirements of Rule 23 could not be weakened by policy considerations favoring class settlements, the *Amchem* decision significantly limited the ability of federal courts to effectively provide solutions to broad consumer product controversies. As noted in Justice Breyer's dissent, individual adjudication of asbestos claims had led to "[d]elays, high costs, and a random pattern of noncompensation," at the same time absorbing a vast amount of judicial resources.¹⁸⁰ While noting these concerns,¹⁸¹ the majority was unwilling to expand the role of courts to include the regulatory authority necessary to oversee an effective compromise. As Justice Ginsburg wrote in concluding the opinion:

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load . . . heaped upon it.¹⁸²

178. *Id.* at 598–99 (“In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation.”).

179. *Id.* at 622–23 (citations omitted).

180. *Id.* at 631–32 (Breyer, J. concurring in part and dissenting in part).

181. *Id.* at 629 n.21.

182. *Id.* at 628–29.

Faced with the multitude of policy concerns inherent to class certification, the majority chose to embrace a conservative approach of strict adherence to Rule 23's requirements as a means of protecting the role of courts as adjudicators, rather than regulators. In so doing, the Court turned back the wave of class certifications based on policy considerations and substantially limited the regulatory scope of class action litigation.

B. The Federalism Dilemma

While the Supreme Court was clear in its determination to enforce the requirements of Rule 23 in federal courts, federalism concerns largely limited the ability of federal courts to require the same restrictive view of class certification in state courts. With the decision in *Shutts* upholding state court jurisdiction over classes of nationwide plaintiffs,¹⁸³ state and federal courts increasingly came into conflict over the issuance of final judgments or settlements binding nationwide classes.¹⁸⁴ While federal courts could employ injunctions in certain instances, this power could not prevent states from certifying classes rejected in federal courts.¹⁸⁵ Further, the Supreme Court has refused to cross certain federalism boundaries, limiting attempts to expand removal of state actions undermining federal judgments relating to complex class litigation.¹⁸⁶ Consequently, the Supreme Court has not provided clear boundaries between federal and state authority over nationwide class actions, allowing state courts to significantly weaken the restrictive view of class certification put forth by the Court in *Amchem*.

As prefaced in Part II, the ability of federal courts to use injunctions under the All Writs Act to restrict state court actions is

183. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985).

184. *See Wes*, *supra* note 132, at 1602.

185. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998) (rejecting the request for an injunction barring class settlement in Louisiana state court where the class settlement had previously been rejected by the Third Circuit).

186. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002) (rejecting the use of the All Writs Act to support removal). *See generally Hoffman*, *supra* note 108. The Supreme Court has also narrowly upheld the right of absent class members to collaterally attack the adequacy of federally approved class settlements through state court actions. *See Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003). With Justice Stevens taking no part in the decision, the Court was evenly divided four votes to four, subsequently upholding the decision of the Second Circuit in *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001). *Id.*

significantly restricted by the Anti-Injunction Act.¹⁸⁷ In the context of class actions, federal courts have been able to make some use of injunctions, but only where class settlement has been accepted or is pending in the federal court.¹⁸⁸ The Second Circuit upheld an injunction, for instance, to prevent the filing of state court suits that might have undermined a pending settlement of a multidistrict securities class action.¹⁸⁹ Further, the Third Circuit upheld an injunction barring a Texas state court from approving a mass opt-out of state class members from a nationwide class settlement of diet drug claims approved by the Eastern District of Pennsylvania.¹⁹⁰ Yet the power of federal courts to enjoin state court actions does not extend to cases where the federal court has rejected class certification. As was mentioned in Part II, a Louisiana state court accepted a class settlement of claims involving fuel tanks in General Motors pickups that had previously been rejected by both the Third Circuit and Texas state courts.¹⁹¹ On hearing the appeal of a group of class objectors seeking to enjoin the Louisiana state court action, the Third Circuit refused to extend the preclusive effect of its prior judgment to state courts by way of injunction.¹⁹² “[D]enial of class certification under these circumstances lacks sufficient finality to be entitled to preclusive effect. Second, the decision by this Court to reject the provisional settlement class is not a ‘judgment’ with respect to the Louisiana settlement agreement, and our interpretation of Rule 23 is not binding on the Louisiana court.”¹⁹³ Indeed, this holding was in keeping with prior Supreme Court rulings limiting the “relitigation exception” of the Anti-Injunction Act.¹⁹⁴

Further, the Supreme Court has rejected the use of the All Writs Act as a means of removing class action litigation to federal courts.¹⁹⁵

187. 28 U.S.C. § 1651 (2000).

188. *See Wes*, *supra* note 132, at 1633.

189. *In re Baldwin-United Corp.*, 770 F.2d 328, 332–33 (2d Cir. 1985). While the Second Circuit expressly evaluated the limitations imposed by the Anti-Injunction Act, it is not clear that the act applies before state court actions have commenced. *See Wes*, *supra* note 132, at 1624–25.

190. *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002).

191. *See supra* note 128 and accompanying text.

192. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998).

193. *Id.* at 146.

194. *See, e.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

195. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002); *see also Hoffman*, *supra* note 108, at 607–19.

In *Syngenta Crop Protection, Inc. v. Henson*,¹⁹⁶ plaintiffs who had been actively involved in a class settlement of exposure claims against a chemical company in the Southern District Court of Alabama subsequently attempted to amend and maintain a previously stayed Louisiana state court action against the company, despite having agreed to dismiss with prejudice all their claims as part of the federally approved settlement.¹⁹⁷ Faced with a state court judge willing to assess plaintiffs' contention that their state claims were distinct from those involved in the federal action, the chemical company sought to remove the case to federal court based upon the All Writs Act.¹⁹⁸ A unanimous Supreme Court definitively rejected this expanded use of the All Writs Act, stating that the Act did not "by its specific terms, provide federal courts with an independent grant of jurisdiction"¹⁹⁹ Indeed, Chief Justice Rehnquist noted that outside of a federal court injunction, the chemical company would have to rely upon the preclusion analysis of the state court: "One in petitioners' position may apply to the court that approved a settlement for an injunction requiring dismissal of a rival action. Petitioners could also have sought a determination from the Louisiana state court that respondent's action was barred by the judgment of the Alabama District Court."²⁰⁰ As such, the Court has granted state courts significant influence over many class actions, while limiting the ability of defendants to protect prior victories on class certification within federal courts. In so doing, the Court also left its own restrictive analysis of class certification open to reinterpretation by state courts with different policy views.

IV. CONGRESS RE-CALIBRATES THE BALANCE OF FEDERALISM

In the wake of *Amchem*,²⁰¹ federal courts became very difficult forums for parties seeking certification of nationwide classes or approval of nationwide class settlements.²⁰² While some negative-

196. 537 U.S. 28 (2002).

197. *Id.* at 30.

198. *Id.*

199. *Id.* at 33 (quoting Brief for Petitioners at 9, *Henson*, 537 U.S. 28 (No. 01-757)).

200. *Id.* at 34 n*.

201. *Amchem Prods., Inc. v. Windsor* 521 U.S. 591 (1997).

202. See, e.g., *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (relying on analysis from *Amchem* in decertifying class claiming race discrimination); *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226, 228 (S.D. W. Va. 1997) (withdrawing prior approval of class

value classes have been certified on a statewide basis,²⁰³ controversies that can be managed through class actions in federal courts appear to be severely limited in both their geographic scope and range of injury.²⁰⁴ In fact, a recent survey found that only 22 percent of class actions removed to federal courts were certified for either trial or settlement.²⁰⁵ For consumer product claims, the federal courts are particularly skeptical that a class could meet the requirements of Rule 23.²⁰⁶

In contrast, state courts are commonly perceived as more receptive to certifying nationwide class actions.²⁰⁷ As stated in the Senate report regarding CAFA, “some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions.”²⁰⁸ Indeed, this perceived disparity in class action treatment between state and federal courts has been shown to play a significant part in attorneys’ forum choices.²⁰⁹ As a result, class action plaintiffs generally focused their efforts on state courts following *Amchem*.²¹⁰

But state courts in general have not granted class certification at a significantly higher rate than federal courts.²¹¹ Instead, the perception of “drive-by class certification”²¹² in state courts has been

settlement and certification of class of smokers following the decision in *Amchem*). See generally Vairo, *Judicial v. Congressional*, *supra* note 59, at 1597–602.

203. See, e.g., *Daffin v. Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006) (upholding certification of a class of Ohio minivan owners claiming a potential defect devalued the vehicle); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003) (overturning decertification of a class of Massachusetts and New Hampshire cellular phone customers alleging breach of contract claim for overcharges).

204. See generally Nicole Ochi, *Developments, Are Consumer Class and Mass Actions Dead? Complex Litigation Strategies After CAFA and MMTJA*, 41 Loy. L.A. L. Rev. 965 (2008).

205. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635 (2006).

206. See *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001) (“Our circuit has recognized the potential difficulties of ‘commonality’ and ‘management’ inherent in certifying products liability class actions.”); *In re Am. Med. Sys., Inc.*, 1996 FED App. 0049P at 24–25 (6th Cir.) (noting that products liability classes present challenges for certification because they usually involve factual and legal issues that vary from individual to individual).

207. See S. REP. NO. 109–14, at 14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14–15.

208. *Id.*

209. See Willging & Wheatman, *supra* note 205, at 602–14; Ochi, *supra* note 204.

210. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1597–99.

211. See Willging & Wheatman, *supra* note 205, at 635.

212. S. REP. NO. 109–14, at 22 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 22.

fueled by a relatively small number of jurisdictions, labeled by defendants as “judicial hellholes,”²¹³ where judges have taken a comparatively expansive view of class certification.²¹⁴ In fact, particular jurisdictions saw a dramatic spike in the number of class actions filed in their districts following *Amchem*, as plaintiffs lawyers sought out friendly forums for nationwide class certification.²¹⁵

While there are no wide disparities between the rules adopted by states and the federal courts,²¹⁶ some state courts have clearly interpreted the policy issues underlying class certification differently than the Supreme Court.²¹⁷ For instance, one state court in a county particularly popular with plaintiffs found that “[t]he policy objective behind class actions is to *encourage* individuals, who may otherwise lack an incentive to file individual actions because their damages are limited, to join with others to vindicate their rights in a single action.”²¹⁸ As such, some plaintiffs lawyers have gone to great lengths to establish jurisdiction in particular state forums and protect their actions from removal to federal courts.²¹⁹

Congress reacted to these trends by attempting to move the adjudication of most interstate class actions into federal courts,²²⁰

213. See AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2007, at ii (2007), <http://www.atra.org/reports/hellholes/report.pdf>. For an in depth discussion of judicial hellholes, see Feit, *supra* note 73 at 922-25.

214. See S. REP. NO. 109-14, at 13-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 13-15 (identifying several of these “magnet” jurisdictions, such as Madison County, Ill.).

215. *Id.* (noting that the largely rural Madison County, Ill., for instance, saw the number of class actions filed annually in the county rapidly increase from a total of 2 in 1998 to 106 in 2003).

216. See *id.*; Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1913 (2006).

217. See *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618 (holding that class certification is appropriate where the law of the defendant's home state could be applied to all claims, even when the class includes members from all fifty states).

218. *Phillips v. Ford Motor Co.*, No. 99-L-1041, 2003 WL 23353492, at *1 (Ill. Cir. Sept. 15, 2003) (emphasis added).

219. See Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779 (2006) (discussing the efforts of plaintiffs to defeat removal by adding uninvolved parties in an effort to defeat complete diversity); James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013 (2006); see also S. REP. NO. 109-14, at 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11 (“One witness at the Committee's 2002 hearing on class actions testified that her drug store was named as a defendant in ‘hundreds of lawsuits’ so that ‘the lawyers could keep the case in a place known for its lawsuit-friendly environment.’”).

220. See S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5 (“[CAFA] corrects a flaw in the current diversity jurisdiction statute (28 U.S.C. § 1332) that prevents most interstate class actions from being adjudicated in federal courts.”).

essentially drawing the federalism boundaries related to nationwide class actions that the Supreme Court had previously been unwilling to dictate. The Class Action Fairness Act of 2005 sought this goal by expanding the jurisdiction of federal courts to include class actions where minimal, rather than complete, diversity was met and the total potential amount at issue was over five million dollars.²²¹ Further, the legislation also permitted removal without the consent of all defendants, allowed defendant state residents to file for removal, and eliminated the one-year time limit on seeking removal for class actions.²²² As stated in the Senate Judiciary Committee's report in support of the bill, "Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court."²²³

While addressing the federalism problem inherent within nationwide class actions, this act was certainly not the kind of legislation envisioned by Justice Ginsburg or the Ad Hoc Committee on Asbestos Litigation as a real solution to the regulatory problems created by such controversies.²²⁴ Indeed, CAFA placed greater restrictions on potential settlements of class actions.²²⁵ In so doing, Congress underscored the decision in *Amchem* limiting courts' regulatory role but provided no alternative means for resolving the underlying issues. As such, Congress largely embraced policy goals that effectively limit the ability of courts to protect consumer interests through claim aggregation. Further, there are significant questions as to whether CAFA actually provides an effective balance to the federalism issues inherent within nationwide class actions.

221. See *id.* at 28 (detailing the CAFA's modifications to removal procedures and federal jurisdiction over class actions). CAFA did create a "Home State" and a "Local Controversy" exception to federal jurisdiction under the modified provisions of 28 U.S.C. § 1332, both of which require that two-thirds of the plaintiff class reside in the same state. See *id.* at 28–29.

222. See *id.* at 29. However, the legislation did keep in place the requirement that removal occur within thirty days of notice of grounds for removal. See *id.*

223. *Id.* at 5.

224. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (concluding that real reform would require federal legislation creating a "national . . . dispute-resolution scheme").

225. See S. REP. NO. 109-14, at 29–35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 28–34.

A. The Policy Issues Underlying CAFA

Citing what the Senate report referred to as a problem of “state court provincialism” in the area of nationwide class actions, the stated purpose of CAFA was to correct “a technical glitch in the diversity jurisdiction statute” that excluded many such cases from federal courts.²²⁶ But as the “complete diversity” requirement has been imputed to federal diversity jurisdiction since 1806,²²⁷ it is difficult to imagine how the Senate could have realistically considered “complete diversity” to be a “glitch.” Indeed, the implication that CAFA amounted to mere procedural change has been severely criticized by some commentators as anti-democratic in masking the significant substantive effects of the legislation.²²⁸

Yet CAFA does largely resolve the federalism issue of jurisdictional control over nationwide classes outlined earlier.²²⁹ Aside from the rare cases of a “home state” or “local controversy” exception,²³⁰ defendants will now be able to successfully remove most interstate class actions to federal court. Further, significant issues involving the adequate representation of class members and the “judicial blackmail” effect of class certification were presented in support of CAFA.²³¹

But these are problems that are inherent to the aggregation of mass claims, not necessarily inherent to the protection of broad consumer interests. Seen in the context of Justice Burger’s earlier point from *Deposit Guaranty*,²³² Congress essentially combated the untoward consequences of class aggregation by limiting the most available form of consumer relief. The implication of Justice Ginsburg’s comments in *Amchem* about congressional inaction in dealing with the national asbestos crisis is that such broad consumer

226. *Id.* at 6.

227. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

228. See Lind, *supra* note 112 (arguing that the expansion of federal jurisdiction over class actions combined with the heightened federal limitations on certification represents a denial of substantive rights); Vairo, *Judicial v. Congressional*, *supra* note 59.

229. See S. REP. NO. 109-14, at 10–14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11–15.

230. See *supra* note 221 and accompanying text (outlining these exceptions).

231. See S. REP. NO. 109-14, at 14–22 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 14–23.

232. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (“[T]he remedy for abuses does not lie in denying the relief sought . . . but with re-examination of Rule 23 as to untoward consequences.”).

product issues require legislative solutions.²³³ But rather than provide any legislative solutions to the management of broad consumer product issues, CAFA simply expanded *Amchem*'s limitations of judicial regulation. By moving these cases into federal court under a broadened diversity jurisdiction, Congress reduced the side effects of class certification by limiting the availability of the remedy.

1. Drive-By Certification

Madison County, Illinois, a small rural county with a penchant for certifying nationwide class actions, provided a perfect poster-child for class action reformers supporting CAFA.²³⁴ Decisions by Madison County judges to certify controversial nationwide classes²³⁵ allowed CAFA supporters to clearly define the menace of isolated jurisdictions applying a "I never met a class action I didn't like" approach to class certification."²³⁶ Indeed, the specter of backwater judges adjudicating broad nationwide classes with effects on interstate commerce illustrates the longstanding concern about bias against out-of-state defendants that underlies the historical basis for diversity jurisdiction.²³⁷

While some of this "drive-by certification" rhetoric may be overblown,²³⁸ the imbalance in the standards applied to certifying class actions does present a serious issue to both out-of-state defendants and other states. The Senate report on CAFA noted that state courts were dictating national policy by certifying actions that

233. *Amchem Prods., Inc. v. Windsor* 521 U.S. 591, 598–99 ("In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation.").

234. See S. REP. NO. 109-14, at 13, 22–23 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 13–14; see also AM. TORT REFORM ASS'N, JUDICIAL HELLHOLES 2004 (2004), <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>. Moreover, by 2007, the American Tort Reform Association moved Madison County off its primary list of offenders, citing improvements in judicial management in the county. See AM. TORT REFORM ASS'N, *supra* note 213.

235. See, e.g., *Phillips v. Ford Motor Co.*, No. 99-L-1041, 2003 WL 23353492 (Ill. Cir. 2003) (certifying a nationwide class seeking recovery for paint defects in older model Ford vehicles). *But see Ford Motor Co. v. Sheldon*, 113 S.W.3d 839 (Tex. App. 2003) (rejecting previously this proposed class).

236. S. REP. NO. 109-14, at 22 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 22.

237. See *id.* at 11–12, *reprinted in* 2005 U.S.C.C.A.N. 3, 12–13.

238. See *id.* at 22. It should be noted that several of the abusive certification decisions cited in the Senate report were subsequently overturned on appeal.

affected interstate commerce,²³⁹ even when the major parties involved had no significant contact with the forum.²⁴⁰ The report argued that in so doing, state courts were usurping the regulatory authority of state and federal officials.²⁴¹ While the Supreme Court allowed just this type of action in *Shutts*, the Court's rationale was based upon the protection afforded by a conservative analysis of the requirements of Rule 23.²⁴² By broadening the diversity jurisdiction of federal courts to include almost any class action with interstate effects,²⁴³ CAFA allowed out-of-state defendants to remove such actions to federal courts, ensuring that the more restrictive view of courts' regulatory roles expressed in *Amchem* would be applied to most nationwide class actions.

Through this jurisdictional change, CAFA's supporters hoped to limit the blackmail effect felt largely by corporate defendants facing class certification in state courts.²⁴⁴ Citing Judge Posner's opinion from *Rhone-Poulenc*,²⁴⁵ the Senate report argued that:

Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling-rather than litigating-frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. Nonetheless, state court judges often are inclined to certify cases for class action treatment not because they believe a class trial would be more efficient than an individual trial, but because they

239. *Id.* at 23–27 (“Why should an Alabama state court tell 20 million people in all 50 states what kind of airbags they can have in their cars?”).

240. *See id.* at 13.

241. *Id.* at 24 (quoting District of Columbia Insurance Commissioner Lawrence Mirel as testifying “class actions ‘frequently go[] around or simply ignore[] the role of state regulators’” (alterations in original)).

242. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

243. *See* S. REP. NO. 109-14, at 28–29 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 28–29.

244. *See id.* at 20–21, *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

245. *Id.* at 21, *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

believe class certification will simply induce the defendant to settle the case without trial.²⁴⁶

CAFA's drafters highlighted these policy fears in order to support their effort to enforce the narrow, federal interpretation of class certification's requirements under Rule 23, rather than the more expansive use of class certification implemented by some state courts. As such, the question that starts to emerge in response to the passage above is whose substantive rights are affected by the limitation of class certification?

2. The Consumer Class Action Bill of Rights

However, CAFA was also arguably intended as a defense of absent plaintiff class members' interests against unscrupulous class counsel.²⁴⁷ The legislation created what its supporters called a "consumer class action bill of rights," which enacted provisions meant to limit abusive settlements that primarily benefit class counsel.²⁴⁸ Focusing extensively on the use of coupon settlements in negative-value class claims, the Senate report lists over twenty cases where class members received negligible benefits while class counsel received extensive fees.²⁴⁹ The examples range from unfavorable coupon settlements—such as a class settlement with a manufacturer of asbestos-laden crayons that provided class members a \$0.75

246. *Id.* at 20–21, *reprinted in* 2005 U.S.C.C.A.N. 3, 21.

247. *Id.* at 14–21. Following CAFA, there have in fact been some high profile cases where prominent class action plaintiff attorneys were charged with fraud in connection with their handling of class action claims. *See* Michael Parrish, *Leading Class-Action Lawyer Pleads Guilty to Conspiracy*, N.Y. TIMES, Oct. 30, 2007, at C9 (detailing the guilty plea of one of the country's most prominent class action attorneys for conspiring to obstruct justice because of efforts made to ensure his firm was named lead counsel); *see also* Adam Liptak, *Fraud Inquiry Looks at Lawyers in Diet-Drug Case*, N.Y. TIMES, Mar. 24, 2007, at A1 (detailing a federal grand jury investigation of attorneys involved in the fen-phen settlement who allegedly defrauded their clients of portions of their settlement payouts).

248. *See* S. REP. NO. 109-14, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6 ("[Section 5 of CAFA] includes a consumer class action bill of rights, with multiple components. One element prohibits federal courts from approving coupon or 'net loss' settlements without making written findings that such settlements benefit the class members. Another element specifies the methods for calculating attorneys' fees in class settlements in which coupons constitute all or part of the relief afforded to claimants to ensure that such fee awards are consistent with the benefits afforded class members or the amount of real work that the class counsel have performed in connection with the litigation. Yet another element of the bill of rights provides an additional mechanism to safeguard plaintiff class members' rights by requiring that notice of class action settlements be sent to appropriate state and federal officials, so that they may voice concerns if they believe that the class action settlement is not in the best interest of their citizens.").

249. *Id.* at 14–20, *reprinted in* 2005 U.S.C.C.A.N. 3, 15–20.

coupon towards the purchase of new crayons and class counsel over \$600,000 in fees²⁵⁰—to even more extreme cases where class members actually lost money as a result of the settlement²⁵¹ and even would have been required to sell their homes if they had not opted out.²⁵²

In an effort to block such outcomes, CAFA established new requirements for the approval of class settlements.²⁵³ First, CAFA requires judicial findings of a proposed settlement's benefits to consumers, specifically including an examination of the actual value and expected utilization of coupons used as part of the settlement.²⁵⁴ Second, CAFA establishes significant limitations on the methods used for determining attorneys' fees in settlements, in an effort to limit large payouts to class counsel when the class itself receives little of value.²⁵⁵ Finally, the legislation also created extensive notification requirements, specifying state and federal authorities to be made aware of class settlements in order to allow relevant agencies time to object.²⁵⁶

B. CAFA's Shortcomings

Lost within these new requirements, however, is that class claims often represent more to plaintiffs than just the financial recovery sought, particularly for negative-value claims where aggregation may provide the only significant form of consumer protection for the product involved. Situations involving tainted dog food or lead paint on toys may present significant health concerns but no individual damages high enough to warrant a sole plaintiff to sue. In such cases where there is no large, positive-value claim that

250. *Id.* at 18, *reprinted in* 2005 U.S.C.C.A.N. 3, 18.

251. *Id.* at 14–15, *reprinted in* 2005 U.S.C.C.A.N. 3, 15. One class settlement approved by an Alabama state court involved the Bank of Boston where plaintiffs' counsel were paid \$8.5 million in fees that were simply deducted from class members' escrow accounts with the bank, often significantly exceeding the \$8.76 awarded to individual class members as part of the settlement. *See Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996).

252. *See* S. REP. NO. 109-14, at 15 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 15–16 (citing a class settlement approved in Kansas that would have required some of the class members to sell their homes for twice their appraised value to the defendant); *Kansas Case in Class by Itself*, NAT'L L.J., Mar. 15, 1999.

253. *See* S. REP. NO. 109-14, at 29–35 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 29–35.

254. *Id.*

255. *Id.*

256. *Id.*

can move forward absent aggregation, denial of class certification bars judicial influence over the underlying consumer protection problem altogether.

Individual, negative-value plaintiffs are often not even interested in the paltry relief they might individually receive.²⁵⁷ What such plaintiffs do care about is eliminating the underlying problem: forcing companies to be more careful about hazardous products that affect consumers. As such, negative-value plaintiffs may not care about the coupon they are eligible to receive as a result of a class action, but they do care about the consumer protection issue that underlies the coupon.

Amid CAFA's focus on the regulatory effect of state court decisions, the "blackmail effect" of class certification on corporate defendants, and the protection of absent class members' interests, there is one significant policy interest that is overlooked: the ability of consumers to seek redress and protection through aggregation. As the federal courts have taken a more restrictive view of class certification requirements and Congress has extended the application of this view by expanding federal jurisdiction over class actions, the original goal behind the 1966 changes to Rule 23 has necessarily been limited. As such, commentators have described CAFA as a procedural effort at tort reform,²⁵⁸ rather than an attempt to protect class members' true interests. Further, CAFA's expansion of federal jurisdiction over interstate class actions through diversity, rather than legislation creating federal question jurisdiction, provides only a partial answer to the federalism issues inherent within nationwide class actions. Accordingly, CAFA has changed the dynamic of the policy debate associated with nationwide class actions without providing any lasting solutions to the underlying issues involving regulation or federalism.

257. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 120 (2007) (noting that participation rates in most low-value settlements are less than 15 percent of the eligible class, particularly coupon settlements where participation rates have been as low as 0.002 percent).

258. See, e.g., Lind, *supra* note 112, at 747; Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform"*, 39 AKRON L. REV. 909, 933 (2006).

1. CAFA's Window Dressing

While CAFA was at least partially directed at these two issues, the Senate report outlining its intent masks the fact that the end result is to limit the use of class actions altogether,²⁵⁹ leaving one commentator to describe the findings and purposes behind the statute as at best “window dressing” and at worst “bullshit.”²⁶⁰ In attacking CAFA as a covert effort to limit both plaintiffs’ substantive rights and states’ policy decisions, Professor JoEllen Lind argues that “CAFA is designed to make it much more difficult for products liability actions and mass tort cases to be brought as class actions at all, because the legislation specifically requires that the federal standards for class certification—an increasingly demanding requirement—be applied to them and the bill’s drafters assume that these actions will not be certified.”²⁶¹ Further, some commentators have suggested that CAFA was also intended to completely forestall negative-value consumer claims.²⁶²

Indeed, the bar on nationwide class actions presented by the choice-of-law analysis in federal courts was at least partially challenged during the course of the legislative debate regarding CAFA.²⁶³ While not outlining federal choice-of-law standards for such cases, Senator Dianne Feinstein suggested an amendment that would have at least reminded federal courts that the relevance of more than one state’s law to an action should not prevent certification due to choice-of-law conflicts where subclasses could be effectively used.²⁶⁴ While this amendment presented a fairly tepid response to the restrictive approach to Rule 23 taken in federal courts, the Senate’s rejection of even this limited language suggests that CAFA’s primary supporters were less interested in protecting consumer interests than in limiting the dangers presented by class certification to corporate defendants.

259. See S. REP. NO. 109-14 (2005), reprinted in 2005 U.S.C.C.A.N. 3.

260. See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) (citing HARRY G. FRANKFURT, ON BULLSHIT (2005)).

261. See Lind, *supra* note 112, at 747.

262. *Id.*

263. See S. Amendment 4 to S. 5, 109th Cong., 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005) (proposing an amendment to CAFA that would have instructed federal courts not to deny class certification just because “the law of more than one state will be applied”).

264. *Id.*; see also Nagareda, *supra* note 216, at 1919.

2. CAFA's Choice-of-Law Irony

Far from advancing any federal method for resolving the choice-of-law conflict, CAFA expressly swears off any intent to alter the complex application of state substantive law to nationwide class actions under federal diversity jurisdiction.²⁶⁵ As detailed in the Senate report, "[T]he Act does not change the application of the Erie Doctrine, which requires federal courts to apply the substantive [state] law dictated by applicable choice-of-law principles in actions arising under diversity jurisdiction."²⁶⁶ Since the application of state law in nationwide class actions presents multiple problems for class certification, the adoption of such language underlines the, at best, ambivalent attitude of CAFA's supporters towards this restriction.

Yet for a statute that was largely supported by the premise that class certification of nationwide actions presented threats to the federal realm of interstate commerce,²⁶⁷ the adherence to state substantive law proves more than just ironic. As detailed by Professor Richard A. Nagareda, Congress's decision to expand federal diversity jurisdiction—rather than create federal question jurisdiction through some sort of federal law regarding nationwide consumer controversies—presents potential problems for the desired application of class certification requirements in federal courts.²⁶⁸ As held in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,²⁶⁹ federal courts must apply the choice-of-law provisions adopted by the state in which the court sits.²⁷⁰ Accordingly, a district court sitting in Oklahoma would be ostensibly bound to adopt the Oklahoma Supreme Court's decision to allow certification of a nationwide class when the law of a defendant's home state can be applied to all of the claims,²⁷¹ even though this decision was directly criticized by the

265. S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46 (citing *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938)); *see also* H.R. REP. NO. 108-144, at 26 (2003) ("[CAFA] does not change substantive law—it is, in effect, a procedural provision only. As such, class action decisions rendered in Federal court should be the same as if they were decided in State court—under the *Erie* doctrine, Federal courts must apply State substantive law in diversity cases.").

266. S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46.

267. *Id.* at 5, *reprinted in* 2005 U.S.C.C.A.N. 3, 5 ("Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court.").

268. *See* Nagareda, *supra* note 216, at 1912–22.

269. 313 U.S. 487 (1941).

270. *Id.* at 496.

271. *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618.

Senate report supporting CAFA.²⁷² In such cases, CAFA does not fully prevent the application of class certification standards from individual states that are not in line with federal precedent. As such, the forum shopping concerns underlying both *Erie*²⁷³ and CAFA could return if more state supreme courts begin to diverge in their policy assessments of class certification.²⁷⁴

However, the fact that CAFA will push most nationwide class actions into federal court—leaving little opportunity for state courts to make such assessments—makes this possibility very unlikely. Accordingly, CAFA has been criticized as an undemocratic attack on the independence of states to apply their own policy judgments to the adjudication of nationwide class actions.²⁷⁵ Yet it is very difficult to argue that Congress overstepped its constitutional authority by using a procedural device to limit the aggregation of mass claims or the ability of states to regulate such controversies.²⁷⁶ The power of Congress to establish federal court jurisdiction is well established,²⁷⁷ and the potential effects of nationwide class actions clearly present issues of national concern regarding the regulation of interstate commerce.

Through its jurisdictional expansion of the restrictive interpretation of Rule 23 prevalent in federal courts, Congress has essentially removed a significant layer of potential national regulation. But in the balance of federalism concerns presented by interstate commerce regulation, Congress's ability to limit the protection of certain rights is just as valid as Congress's ability to grant those rights.²⁷⁸ While supporting this decision on the basis of

272. See S. REP. NO. 109-14, at 25 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 25.

273. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

274. There is some indication, however, that states have begun to react to the same corporate lobbying that drove CAFA by creating more restrictive procedures for handling state class actions. See Feit, *supra* note 73, at 927.

275. See Vairo, *Judicial v. Congressional*, *supra* note 59, at 1621; Lind, *supra* note 112, at 776–77.

276. But see Vairo, *Judicial v. Congressional*, *supra* note 59, at 1616–25 (arguing that CAFA could be viewed as unconstitutional under the analysis developed in the Supreme Court's recent federalism cases).

277. See, e.g., U.S. CONST. art. III; *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

278. If seen as de facto regulatory action, as both CAFA and commentators have suggested, the actions of state courts that burden interstate commerce could also be seen to raise issues related to the dormant commerce clause. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 312

the dangerous effects inherent in class actions, CAFA provides less of a remedy to the underlying regulatory problems in order to prevent one remedy's side effects. As such, the compelling issue underlying the future consequences of CAFA is not what effects the act will have on the balance of federalism but what future protections will be provided to nationwide claimants whose interests can no longer be protected via the judicial regulation inherent to claim aggregation.

V. GETTING WHAT YOU PAID FOR

"Respect us, that's the message."²⁷⁹ This was the sentiment of one of the jurors from the first Vioxx trial after assessing \$229 million in punitive damages against Merck.²⁸⁰ As the forewoman of the jury said, "We expect accountability; we expect them to be open with us; we expect them to be honest with us."²⁸¹ However, "us" and "them" really have no boundaries in the broader scope of our consumer-based economy. The executives at Merck surely buy toys for their children and dog food for their pets just like everyone else in this country, and when they do so, their expectations are likely very similar to the ones of that Texas jury.

But are these expectations realistic? In the present balance of consumer protections, are manufacturers really compelled to be accountable for the products they offer to U.S. consumers, to be open with consumers about the hazards that may accompany these products, and to be honest with consumers about these dangers? The current state of consumer litigation does not suggest this to be the case. Lost in the valid criticism of many class actions as simple transfers of "money from corporations to class counsel"²⁸² are the abuses of consumer trust that underlie these suits. Further, the current state of U.S. regulatory agencies should provide no one with the confidence that these protections are being provided by the

(1992) (outlining the development of the dormant commerce clause's limitation on state influence over interstate commerce).

279. Berenson, *Merck Liable*, *supra* note 26, at A1.

280. *Id.* This sentiment was clearly not shared by Texas appellate courts as this judgment was first reduced and subsequently thrown out altogether. See Alex Berenson, *Courts Reject Two Major Vioxx Verdicts*, N.Y. Times, May 30, 2008, at C2.

281. *Id.* at C13.

282. S. REP. NO. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6.

federal government.²⁸³ So, what's going to change: the direction of class action litigation, federal regulatory policy, or consumer expectations?

A. Litigation's Consumer Protection Limitations

Despite the many legitimate criticisms of CAFA,²⁸⁴ the problems that prompted the legislation—isolated state courts applying uneven certification standards with interstate commerce effects, absent class members being used by self-interested class counsel, and corporate defendants being manipulated by the financial pressures of large class actions—cannot be disregarded. Indeed, these problems go to the very heart of the Supreme Court's fears about misuse of the class action mechanism.²⁸⁵ As outlined in Part II, however, these issues are inherent in class action litigation. The size of the class provides both its power and its potential for abuse. So too, the widespread effects of such litigation naturally create tension points for both horizontal and vertical federalism. Accordingly, the limitation of potential abuses, as attempted in CAFA, necessarily results in a decrease in the potential benefits of class actions, namely the protection of broad consumer interests.

To ignore that CAFA was directly intended to weaken the viability of consumer class actions, however, would be to hide from the political realities that fueled the legislation.²⁸⁶ Having spent

283. See William Neikirk, *Anger, Indignation Mark Toy Recall Hearing*, CHI. TRIB., Sept. 20, 2007, at 4. Discussing the wave of recent recalls involving children's toys with lead paint, "CPSC Commissioner Thomas Moore said, 'We are all to blame,' including 'those who stood by and quietly acquiesced while the commission was being reduced to a weakened regulator.'" *Id.*

284. See, e.g., Burbank, *supra* note 260, at 1942 (questioning the true motives of CAFA's drafters); Lind, *supra* note 112 (arguing that CAFA's expansion of federal jurisdiction over class actions combined with the heightened federal limitations on certification represents a denial of substantive rights); Nagareda, *supra* note 216, at 1912–22 (arguing that CAFA cannot actually adhere to the Erie Doctrine while limiting states' abilities to set their own standards for class certification); Vairo, *Judicial v. Congressional*, *supra* note 59, at 1616–25 (arguing that CAFA could be viewed as unconstitutional under the analysis developed in the Supreme Court's recent federalism cases).

285. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.").

286. See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1862 (2006) ("CAFA clearly sought to keep in place the inherited choice of law regime, under the assumption that the spiral of choice of law dictates of the multiple states where the claims accrue would effectively bar

millions of dollars lobbying for the corporate protections provided by CAFA, business groups “got what they paid for,”²⁸⁷ as one editorial proclaimed, namely, a decrease in the litigation and regulatory pressures created by aggregated claims.²⁸⁸ While well-supported positive-value claims will move forward regardless of aggregation, the ultimate settlement of the broad consumer controversies underlying such claims is certainly impacted by the current restraints on class certification. Further, legitimate negative-value claims that may achieve class certification will be far less appealing to plaintiffs’ counsel under the fee restrictions implemented by CAFA.²⁸⁹ Negative-value claims that are settled under these circumstances may also not provide sufficient pressure on manufacturers to adequately address the underlying problems.

Since CAFA is not retroactive, the legislation’s broadened jurisdictional standards do not apply to the Vioxx class actions, which were generally all filed before the legislation’s approval.²⁹⁰ But the pending Vioxx settlement does highlight some of the issues raised above and provides insight into what the future results of driving similar mass consumer claims into federal courts will be. With plaintiffs unable to certify a nationwide class,²⁹¹ Merck was able to separately litigate the multitude of causation factors associated with individual patients,²⁹² allowing them to undercut the strength of plaintiffs’ cases, which was Merck’s prior knowledge of

nationwide class actions.”); Editorial, *The Class Action Unfairness Act*, N.Y. TIMES, Apr. 25, 2003, at A30.

287. Editorial, *A Dismal Class-Action Finale*, N.Y. TIMES, Feb. 12, 2005, at A16.

288. Some companies have also attempted to prevent the aggregation of consumer claims through arbitration clauses in sales contracts that contractually bar the aggregation of claims. See Nagareda, *supra* note 216.

289. See S. REP. NO. 109-14, at 29–35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 29–35. Because CAFA sets general requirements linking settlement participation and coupon utilization rates with the fees paid to plaintiffs’ counsel, plaintiff attorneys are going to be far less willing to embrace the litigation risks associated with claims where such rates are historically low. See Leslie, *supra* note 257 and accompanying text.

290. See *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1096 (10th Cir. 2005). Pritchett held that CAFA was not retroactive and pointed to the floor statement of Congressman Bob Goodlatte: “Since the legislation is not retroactive, it would have absolutely no effect on the 75 class actions already filed against Merck in the wake of the Vioxx withdrawal.” *Id.*

291. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006) (denying certification to a nationwide class of plaintiffs claiming personal injury as a result of taking Vioxx).

292. See Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Cases*, N.Y. TIMES, Aug. 21, 2007, at A1 (detailing the success of Merck’s litigation strategy) [hereinafter Berenson, *Payday*].

Vioxx's risks.²⁹³ Merck's strategy of attacking each case separately produced a string of victories, and the few substantial judgments against the company were always appealed and sometimes automatically reduced, diminishing their impact through delay and punitive damage caps.²⁹⁴ After years of appeals, almost no significant plaintiff awards still stand,²⁹⁵ despite the disturbing evidence of Merck's prior knowledge of the Vioxx's risks.²⁹⁶ While likely forced to agree to a settlement simply because of the volume of cases,²⁹⁷ Merck was still able to leverage a favorable agreement based on the success of their strategy.²⁹⁸

Depending on how many settlement claims are eventually filed from plaintiffs already involved in the roughly 25,000 current suits, each claimant will receive roughly \$120,000 minus legal fees.²⁹⁹ While the settlement will only be triggered if 85 percent of plaintiffs agree to its terms,³⁰⁰ Merck's total liability under the agreement will be capped at \$4.85 billion, roughly nine months of the company's profits.³⁰¹ The most controversial aspect of the agreement is that plaintiffs' attorneys who wish to take part in the settlement are required to recommend the settlement to all of their clients and terminate representation of clients who choose to continue litigation.³⁰²

Assuming that this settlement goes forward, have any of the issues raised by both Congress and the courts as major problems in the area of mass consumer claims been well served by handling these cases individually rather than as a class? The courts did avoid

293. See Berenson et al., *supra* note 19 (detailing Merck's knowledge of Vioxx's risks).

294. See Berenson, *Payday*, *supra* note 292.

295. See Berenson, *Courts Reject Two Major Vioxx Verdicts*, *supra* note 280.

296. See Berenson et al., *supra* note 19 (detailing Merck's knowledge of Vioxx's risks).

297. See *id.* (noting that the judges handling the thousands of Vioxx cases against Merck were likely tiring of the company's refusal to settle); Nocera, *supra* note 35 ("If Merck had continued to fight, the judges could have piled on so many trials that the company would have been begging for mercy.").

298. See Berenson, *Analysts*, *supra* note 27.

299. *Id.*

300. As of March 2008, more than 44,000 plaintiffs had agreed to join the settlement, signaling that the agreement's threshold numbers will be met if most of these submission are verified. See *Vioxx Settlement on Track as 44,000 Sign Up*, N.Y. TIMES, March 4, 2008, at C11.

301. *Id.*

302. See Berenson, *Alteration*, *supra* note 126 (detailing attempts by some plaintiffs' attorneys to change these requirements arguing that they violate the attorneys' ethical obligations to their individual clients).

wading into unwieldy regulatory issues that would have accompanied class certification,³⁰³ but Merck was still likely forced into a global settlement based solely on the volume of the cases.³⁰⁴ Further, the real winner in the settlement is still plaintiffs' counsel, as a relatively small number of firms will split nearly \$2 billion in fees, while the individual clients—many of whom have lost loved ones—will collect less than \$100,000 each after paying their attorneys.³⁰⁵

Concerns over unscrupulous plaintiffs' counsel should actually be heightened in the wake of the settlement's provisions. The requirement that counsel must recommend settlement to all of their clients and withdraw from representing clients who do not choose to settle raises fairly obvious ethical concerns about the duty of plaintiffs' counsel to provide the best legal advice for their individual clients.³⁰⁶ Yet unlike in a Rule 23 settlement, there is no requirement that a court evaluate the fairness of the agreement, regardless of whether it is unduly coercive on plaintiffs. Further, Merck's intent in demanding this provision was to prevent plaintiffs' counsel from cherry-picking the most meritorious claims for continued litigation, while settling the difficult claims.³⁰⁷ In essence, Merck is trying to limit plaintiffs' options in the same way they would be limited as part of a class, without subjecting the company to the litigation pressures and oversight inherent to class actions.

While Merck's success in the individual cases produced an agreement that will keep the company out of bankruptcy,³⁰⁸ the broader question is whether this result is really good for consumers. Lost in the settlement's payout numbers and the effects on Merck's stock price are the estimates of the number of people who died from taking a pain reliever whose primary selling point was that it caused

303. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La 2006) (denying certification to a nationwide class of plaintiffs claiming personal injury as a result of taking Vioxx); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372 (2007) (denying certification to a nationwide class of third-party payors who helped pay for Vioxx prescriptions as part of health insurance benefits).

304. See Berensen, *Payday*, *supra* note 287.

305. See Berenson, *Analysts*, *supra* note 27.

306. See Berenson, *Alteration*, *supra* note 126.

307. See *id.* Some commentators have suggested that plaintiffs' counsel will still manage to separate out and litigate their strongest cases by using affiliate firms. See Daniel Fisher, *Will the Vioxx Settlement Work?*, FORBES.COM, Nov. 13, 2007, http://www.forbes.com/2007/11/12/merck-vioxx-lawsuits-biz-health-cz_df_1112vioxx.html.

308. See Berenson, *Analysts*, *supra* note 27.

less stomach irritation than other pain relievers³⁰⁹—not a special life-saving treatment but a pain reliever that Merck knew had serious potential risks years before its recall.³¹⁰ Epidemiologists estimate that Vioxx may have caused over 100,000 heart attacks,³¹¹ with the FDA estimating as many as 55,000 patient deaths.³¹² Identifying which patients out of the twenty million people who took Vioxx had heart attacks because of the drug and not other factors is obviously a messy causation analysis, but the big picture numbers do not really change as a result of twenty jury verdicts.

“I think they’ve gotten off quite easily, frankly, for the problems that they’ve engendered,” said Dr. Eric Topol, a cardiologist who co-authored a study in 2001 warning of Vioxx’s risks.³¹³ Discussing the larger impact of the settlement, Professor Richard Nagareda commented, “It says to companies in the pharmaceutical industry and other areas of mass tort litigation that it really is worth your time of going through two or three or more years of cases.”³¹⁴ The effect is that the regulatory impact of mass consumer claims is watered down over years of quarterly earnings expectations. The once immediate threat to consumer safety becomes lost on the market amid a series of individualized causation analyses.

What have often been ignored in the debates over CAFA are the consequences of limiting the regulatory deterrence of consumer class actions on the marketplace.³¹⁵ In an economic system that generally espouses minimal regulation, civil litigation is relied upon not only to remedy individual rights but also to regulate the market itself.³¹⁶ Unlike Europe, the U.S. does not require any pre-market testing for

309. See *Lawyers Argue Merck Concealed Vioxx Risk*, N.Y. TIMES, Mar. 7, 2006, at C4 (“[Merck] sold the drug beginning in 1999 as a pain reliever for arthritis and osteoarthritis sufferers who found other pain drugs too harsh on the stomach.”).

310. See Berenson et al., *supra* note 19.

311. See Alex Berenson, *Vioxx Jury Adds More in Damages*, N.Y. TIMES, Apr. 12, 2006, at C1.

312. See Harris, *supra* note 1.

313. See Berenson, *Analysts*, *supra* note 27.

314. Carrie Johnson, *Merck Agrees to Blanket Settlement on Vioxx*, WASH. POST, Nov. 10, 2007, at D1.

315. See Elizabeth Chamblee Burch, *CAFA’s Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. (forthcoming Apr. 2008) (manuscript at 36), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=100521 (“Perhaps the most important effect from a consequentialist standpoint is that CAFA may weaken deterrence and inhibit litigation’s use as ex post regulation.”).

316. See *id.*; Burbank, *supra* note 12, at 387.

small consumer goods such as children's toys.³¹⁷ As such, U.S. policy on consumer safety is unique in that it places few barriers to entering the market but instead relies upon the threat of post-market litigation to regulate the actions of manufacturers.³¹⁸ CAFA identified serious problems that are inherent to class action litigation, but in limiting the viability of consumer claims, CAFA undercuts the ability of courts to serve this regulatory function.³¹⁹ Maybe litigation was never a stable way to balance the regulatory spectrum, but the current trends in complex litigation leave U.S. consumers far more dependent upon the regulatory capacity of government agencies.

*B. The Caveat Emptor Commission*³²⁰

CAFA was adopted at the same time that the Bush administration was "hollowing out" the very agencies tasked with protecting consumer safety.³²¹ While charged with regulating the safety of products as diverse as toys and televisions, the budget for the Consumer Product Safety Commission has been steadily cut, reducing staff levels from nearly 1,000 employees in the 1970s to just 420 employees today.³²² As such, the C.P.S.C. has been forced to limit its focus and currently investigates only 10 to 15 percent of the reported injuries linked to consumer goods.³²³ Indeed, the equipment used to test the flammability of clothing has not been updated in three decades, and the area used to test whether toys will easily break into small pieces that could be swallowed is simply the spare space behind an office door. Discussing the cramped and outdated facilities, the single employee assigned to testing toys ironically noted, "This is the toy lab for all of America—for all of the United States government!"³²⁴

317. See Lipton & Story, *supra* note 5, at C1.

318. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE* 4 (2003); Burch, *supra* note 307.

319. Elizabeth Chamblee Burch named this issue "CAFA's dirty little secret." See Burch, *supra* note 307.

320. See Editorial, *The Caveat Emptor Commission*, N.Y. TIMES, Oct. 10, 2007, at A22.

321. See *id.*

322. See Eric Lipton, *Safety Agency Faces Scrutiny Amid Changes*, N.Y. TIMES, Sept. 2, 2007, at A11.

323. *Id.*

324. *Id.*

With only eighty-one field inspectors nationally, the C.P.S.C. has even less ability to detect the importation of dangerous products.³²⁵ For instance, the roughly fifteen million shipping containers that entered the country through Los Angeles area ports last year were overseen by a single inspector working just two to three days a week. According to one report, customs agents in a New York harbor had not seen a commission inspector in six months. Yet even when inspectors identify potentially dangerous items, they rarely have the authority to seize non-compliant products, since many of the commission's standards are now voluntary.³²⁶ The shift towards voluntary compliance standards formed a significant portion of the Bush administration's deregulatory agenda,³²⁷ as many of the top-level positions within the commission were filled with former industry executives.³²⁸

The concept of "voluntary compliance," however, does not seem to translate well in the current global economy. When discussing Chinese manufacturers, one former senior commission aide said, "Time and again, through the translators, they made clear they did not understand this concept What they told us was, 'As far as we are concerned, voluntary means we don't have to.'"³²⁹ Further, as the commission's ability to inspect imported products has decreased, the amount of consumer products imported into the U.S. has increased exponentially, with Chinese-made items alone accounting for roughly twenty percent of all available consumer products for sale in the country today.³³⁰ Overall, the C.P.S.C. appears ill-equipped both practically and philosophically to meet the current challenge of protecting U.S. consumers. The assessment of the

325. *Id.*

326. *Id.*

327. *Id.* The Commission also significantly narrowed the circumstances under which companies must report safety defects, no longer requiring companies to report safety issues that the company believed were predictable or involved misuse.

328. *Id.* For example, John Gibson Mullan, a former lawyer for the A.T.V. industry, became the Commission's director of compliance, taking active involvement in discussions regarding potential regulation affecting his prior clients. In describing Mullan's involvement to block a proposed ban on the sale of adult-sized A.T.V's to children under sixteen, one former Commission official involved with the debate said, "It was almost like he still worked for them, not us." *Id.*

329. *Id.*

330. *Id.*

commission's former poison prevention expert was simply: "Buyer beware—that is all I have to say."³³¹

The situation at the FDA, the agency charged with overseeing the safety of medications and much of the nation's food supply, is sadly similar. Expressing frustration with their lack of authority to mandate warning labels on prescription medication, FDA officials explained that they have no ability to track common dangers found to be connected with a drug after it has been approved for the market.³³² Further, serious questions have been raised about the financial ties of FDA decision makers to the pharmaceutical industry.³³³ One drug safety reviewer with over twenty years of experience at the FDA testified before Congress that the agency had become apt to submit to the demands of drug manufacturers, saying that regulators were "'virtually incapable of protecting America' from unsafe drugs."³³⁴ Amid budget cuts and closed inspection laboratories, the agency also has little ability to adequately screen for dangerous food being imported into the country.³³⁵

C. Consumer Expectations

While perhaps unrealistic, U.S. consumer expectations are certainly not far off from those of the mother of the child sickened from contaminated spinach: "There is an assumption that everything is going to be O.K., that someone must have checked this out"³³⁶ Whose responsibility should it be to reconcile these expectations with reality? As this mother realized, the FDA and C.P.S.C. are clearly not doing much checking, often relying instead on voluntary compliance. Merck seems to do some checking but clearly has its

331. *Id.* Suzanne Barone, the C.P.S.C.'s former head of the poison prevention unit, resigned in 2005 after efforts to require inexpensive child-resistant caps on hair care products that had burned toddlers were delayed so industry costs could be weighed against the potential benefit to children. *Id.*

332. *See* Harris, *supra* note 1.

333. *See* Gardiner Harris & Alex Berenson, *10 Voters on Panel Backing Pain Pills Had Industry Ties*, N.Y. TIMES, Feb. 25, 2005, at A1.

334. *See* Gardiner Harris, *F.D.A. Failing in Drug Safety, Official Asserts*, N.Y. TIMES, Nov. 19, 2004, at A1 (internal quotation marks omitted).

335. *See* Marian Burros, *F.D.A. Inspections Lax, Congress is Told*, N.Y. TIMES, July 18, 2007, at C3 (noting that since 2003 the number of food inspectors at the agency has decreased while food imports have doubled).

336. Burros, *supra* note 6; *see also supra* text accompanying note 6.

own agenda in determining what consumers need to know.³³⁷ Toys 'R' Us says it is going to start checking.³³⁸ China says it has always had a policy of checking.³³⁹

After surveying the many challenges facing courts in trying to manage broad consumer product claims, it is simply not reasonable to expect courts to be able to effectively enforce this multitude of promises to U.S. consumers. As detailed in *Amchem* and CAFA, the breadth of such consumer controversies threatens to distort the judicial role into one of regulator rather than adjudicator. Consumer product controversies that affect millions of consumers represent a failure of government regulation, not a viable opportunity for judicial action to balance the scales. Yet without realistic regulatory safeguards, consumers are left with no other venue to seek protection. The results have left the Supreme Court and Congress struggling with answers that have so far failed to address the underlying problems.

Combined with the limitation of courts' ability to manage broad consumer issues, the Bush administration's drive towards deregulation has left U.S. consumers with very few protections. But in response to the recent wave of consumer product controversies, legislators have begun to recognize the need for the FDA and C.P.S.C. to play larger regulatory roles.³⁴⁰ Indeed, much like how the corporate scandals of 2002 led to a significantly increased enforcement role for the Securities and Exchange Commission,³⁴¹ the current wave of recalls could lead to a much broader agenda for federal regulatory agencies overseeing consumer goods.

337. See Berenson et al., *supra* note 19; *Vioxx Troubled Merck Scientist*, *supra* note 14.

338. See Louise Story, *A Boon for Lead-Testing Companies*, N.Y. TIMES, Sept. 29, 2007, at C1 ("Mattel, Walt Disney, Toys 'R' Us and scores of other toy makers and retailers are responding to the series of recalls this year by adding new product testing in factories and on store shelves.").

339. See Lipton, *supra* note 8, at C2 (In a hearing on the C.P.S.C.'s recent efforts, Senator Richard Durbin "mocked a new agreement with Chinese officials to block lead in toys, saying that the Chinese government told his office the policy had long been in place").

340. See *id.*; Harris, *supra* note 1. This push for broadened regulatory powers for the agencies is not without its critics, including some at the agencies themselves. See Labaton, *supra* note 9 (noting letters from the acting head of the C.P.S.C. stating opposition to proposed legislation that would grant the agency greater powers).

341. See *S.E.C. Charges Accountants and Firms with Sarbanes-Oxley Violations*, N.Y. TIMES, Sep. 14, 2007 (discussing the broader enforcement powers granted to the S.E.C. through the Sarbanes-Oxley Act of 2002 partially as a result of corporate scandals including Enron and Tyco).

Without broader federal regulatory authority and funding, courts will continue to be placed in the position of determining regulatory policy through litigation. Further, state agencies and attorneys general may begin to act independently, as with the recent suit brought by California Attorney General Jerry Brown against toy manufacturers for their use of lead paints.³⁴² Such independent state action will ultimately raise federalism tensions and could raise significant dormant commerce clause issues.

In the face of a changing global economy and pressing concerns over consumer safety, however, some U.S. businesses have begun to embrace the idea that federal regulation could provide valuable protections for both companies and consumers.³⁴³ “There seems to be, at the moment, a fair amount of efforts under way by individual industries to put into statute what had either previously been voluntary consensus standards or industry goals,” said Rosario Palmieri, a regulatory lobbyist at the National Association of Manufacturers.³⁴⁴ Mandatory federal safety regulations could help U.S. companies compete against foreign manufacturers who have previously chosen to ignore voluntary standards in favor of cost savings. Further, such standards could help to restore consumer confidence in the marketplace. But the ultimate issue is whether such a sea change could serve to protect consumers. “What we need to watch closely is if this will achieve a real increase in standards and public protections or simply serve corporate interests,” said Rick Melberth, director of regulatory policy at OMB Watch, a Washington group that tracks federal regulatory actions.³⁴⁵

As part of a long-term rebalancing of consumer protections, federal regulation could be used to limit the litigation pressures faced by companies willing to fully comply with federal standards.³⁴⁶ Indeed, the Supreme Court recently interpreted a preemption clause included by Congress in the Medical Device Amendments of 1976 to bar state common law claims against a certain class of medical

342. See Marc Lifsher & Abigail Goldman, *Lead in Toys Sparks Lawsuit*, L.A. TIMES, Nov. 19, 2007, at 1.

343. See Eric Lipton & Gardiner Harris, *In Turnaround, Industries Seek U.S. Regulations*, N.Y. TIMES, Sept. 15, 2007, at 11 (noting, however, that this push is partially motivated by a desire to establish low regulatory standards in advance of a possible Democratic administration).

344. *Id.*

345. *Id.*

346. See *id.*

devices that receive pre-market approval by the FDA.³⁴⁷ Merck, in fact, unsuccessfully tried a similar argument before a district court that FDA approval of the labeling for Vioxx should protect the company from claims that the warnings were inadequate.³⁴⁸ The Supreme Court will soon hear essentially the same argument in *Levine v. Wyeth*,³⁴⁹ where both the drug company and the Bush administration will argue that FDA approval of medical warnings should impliedly preempt state law claims over their inadequacy.³⁵⁰ This case could potentially grant the FDA a vast expansion of regulatory authority to preempt state law claims,³⁵¹ just as consumer confidence in the competence of federal regulatory agencies has plummeted.

While such litigation protections may ultimately be necessary to take courts out of an uneasy regulatory role, this shift absolutely requires independent and effective regulatory agencies in order to provide sufficient protection for consumers. Unfortunately, the current state of disarray within U.S. regulatory agencies does not support the grant of such preemption measures. If paired with meaningful federal regulation and enforcement of consumer protection standards, such corporate protections could ultimately provide a more beneficial compromise with consumer interests than our current reliance on the limited back-stop of complex litigation. In such a far-off scenario, courts hopefully could focus on outlier acts of individualized misconduct and leave the balancing of regulatory policies to the agencies that are supposedly tasked to serve this role. If the Supreme Court prematurely forces this shift by

347. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). Ironically, Justice Ginsburg, the author of the *Amchem* majority opinion that checked many consumer product claims by limiting aggregation, 521 U.S. 591 (1997), dissented in *Riegel*, arguing that interpreting the pre-emption clause at issue to bar state liability claims conflicted with Congress's intent at the time to strengthen consumer protections. 128 S. Ct. at 1012–20 (“It is ‘difficult to believe that Congress would, without comment, remove all means of judicial recourse’ for large numbers of consumers injured by defective medical devices.” (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984))).

348. See *Judge Rejects Merck's View on F.D.A. Issue*, N.Y. TIMES, July 4, 2007, at C2.

349. 944 A.2d 179 (Vt. 2006), cert. granted, 128 S. Ct. 1118 (2008).

350. See Linda Greenhouse, *Justices to Hear Cases on Product Liability*, N.Y. TIMES, January 19, 2008, at A21.

351. See Christen Linke Young, *Agency Preemption Inputs in Riegel v. Medtronic*, 118 YALE L.J. POCKET PART 22 (2008) (arguing that the Court is unlikely to grant such broad power to the FDA based on dicta in *Riegel*).

granting broad preemptive power to FDA decisions, however, the ultimate effects for consumers could prove disastrous.